

NO. 1900
MARCH TERM, 1911

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHN KITCHEN JR. CO.
(A CORPORATION)

Appellant

VS.

ALEXANDER LEVISON,

Appellee

BRIEF FOR APPELLANT

CHAS. E. TOWNSEND,
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(The reference to the pages refers to the printed Record).

STATEMENT OF THE CASE.

This cause comes before this Court from the Circuit Court of the United States for the Northern District of California, based on a suit for alleged infringement of United States Letters Patent, Re-issue No. 12005, granted July 1, 1902, to Alexander Levison appellee and complainant below for an improvement in Manifold Books.

This appeal is taken by respondent below from a decree sustaining the patent and holding infringement. An injunction was granted and an order for accounting made. The opinion appears in the printed record.

Both appellant and appellee are in the printing business in San Francisco.

The subject matter involved in the litigation pertains to manifold books, such as are employed for shipping receipts, and other forms of receipts, accounts of sales, etc., where a multiple number of receipts are made at one time; and the controversy particularly concerns a manifold book in which a number of record sheets are bound at the stubs, each record sheet being divided into three separable parts; and a double faced carbon being adapted to be interfolded with the three parts of a record sheet so that three receipts will be simultaneously made on the several parts of the sheets at a single writing. After writing the record the sheet is opened out and torn off and the different parts of the sheet separated and distributed.

The reissue patent sued on contains five claims, whilst the original patent contained but one limited claim, not here involved. The suit however is being based only on reissue claims 3-4-5, and those are the claims which were held by the lower Court to be infringed.

Those claims segregated into their several elements, are as follows:

Claim 3—A manifold book comprising in order:

1—a double carbon sheet,

2—and a plurality of recording sheets,

3—the recording sheets outside the stubs being divided into three substantially equal separable parts,

4—and the carbon sheet extending the width of two of said parts,

5—said recording sheets having stubs to which they are attached along lines of perforations,

6—said stubs and one side of the carbon sheet being all bound together to form a book, substantially as described.

Claim 4—A manifold book, comprising in order:

1—a double carbon sheet,

2—and a plurality of recording sheets,

3—each of said sheets outside the stubs being divided into a plurality, not less than three, of substantially equal separable parts,

4—and the carbon sheet extending the width of said parts, except the outermost,

5—said recording sheets having stubs to which they are attached along lines of perforations,

6—said stubs and one side of the carbon sheet being all bound together to form a book, substantially as described.

Claim 5—A manifold book, comprising in order:

1—a double carbon sheets,

2—and a plurality of recording sheets,

3—each recording sheet outside the stub being divided into a plurality, not less than three of separable are attached along lines of perfortaions,

4—Each part being not greater than the part nearest it at the side toward the stub,

5—and the carbon sheet extending the width of the whole of said parts, except the outermost,

6—said recording sheets having stubs to which they are attached along lines of perforations.

7—said stubs and one side of the carbon sheet being all bound together to form a book, substantially as described.

The fine distinctions of patentable differences between these three claims are hard to see. By analysis it will be seen that they differ in phraseology only, in this that claim 3 calls for a 3-part sheet (element 3), and claims 4 and 5 call for a sheet of *not less* than three parts (element 4).

Levison, the patentee, the only expert called for the complainant, testifies himself, page 54, that claims 3-4-5 are substantially alike. Under the law all of these claims cannot be valid.

Two claims alike in scope, only one can be valid:

Hentschel vs. Carthage Co., 169 Fed. 114;

Shepler, 102 O. G. 468;

Nat. Automatic Weighing Machine Co. vs. N. Y. Scale Co., 145 Fed. 951;

Computing Scale Co. vs. Automatic Scale Co.,
204 U. S. 609; 51 L. Ed. 645;

American Can Co. vs. McGinnis, 156 Fed. 784,
6.

The original patent described and covered as built up of *series of sections* or piles, each section or pile comprising in order a cardboard backing, or stop

card, a plurality of record sheets divided into three separable parts and a double faced carbon of two-thirds the length of a record sheet; the *several sections* or piles being all bound together to form one book. The stop cards and carbons are thus disposed at intervals in the completed book so that there are several carbons for one book and a stop card for each carbon; the number of record sheets for each carbon being estimated and determined according to the life of the carbon and the number of sheets in a section or pile. The purpose of the stop card is to form a firm support to write on and to protect the underneath carbons. The carbons and stop cards are all *permanently bound* into the book.

The single claim of the original patent was as follows:

A manifold book:

1—composed of sections, each section comprising in order,

a—a double carbon sheet,

b—a plurality of recording sheets,

c—and a cardboard backing,

2—the recording sheets being divided into three separable parts,

3—the carbon sheets extending the width of two of said parts,

4—and the cardboard backing extending the width of one of said parts,

5—said recording sheets and backings having stubs to which they are attached along lines of perforations,

6—said stubs and the edges of the carbon sheets being all bound together to form a book, substantially as described.

While Levison shows and described several of these sections or piles made up as stated and all bound together under one cover, yet *each section, with its pile of leaves, carbon and stop card*, may be considered, as far as claims 3-4-5 are concerned, *as a book in itself* as will be seen later. The *multiplying* of the number of sections or piles in one book is mere duplication. Although this built up duplicated structure constituted the original invention and the subject matter of the single original claim, or claim one of the reissue as modified, it has nothing to do with the present issues. This distinction is to be borne in mind by the Court, in dealing with the questions of anticipation and infringement. There is no contention that this built up structure of *multiplied sections or piles* is infringed.

The re-issue claims 3-4-5 sued on attempt to cover simply a book made up of a *single section* or pile, comprising one double faced carbon only and a number of record sheets divided into three or more separable parts, the carbon and record sheets being bound together. These claims do not involve in any way a *stop card or cardboard* backing.

The respondent appellant justified under a later patent No. 911597, dated Feb., 1909, (applied

for July 20, 1908), in which the record sheets alone were bound into a book *without* any carbon or stop card; the carbon being a *loose* carbon later inserted among the leaves of the book at any desired point and being freely removable therefrom, and re-inserted at any other point; the stop card being loose so as to be inserted at any point into the book and directly under the sheet to be written on. The *defendant's patent* is primarily on his *carbon*.

The whole issue of infringement hinges on the question, whether defendant's carbon-holding means is the equivalent of the *bound* carbon of Levison.

The grant of defendant's patent on his special carbon-holding means, subsequent to the Levison patent is proof positive that the two are not equivalents. This case is much stronger than the rule concerning "presumption of difference and non-infringement" arising from the grant of a subsequent patent on a *whole machine*. Here defendant's patent is practically based on the *single element* underlying the question of equivalency. Patentable difference presupposes lack of equivalency.

PLAINTIFF'S ORIGINAL PATENT.

(For drawing, see plate at back of this brief).

As far as the drawings are concerned, they are the same in both the original Levison patent and the re-issue patent, here sued on.

The drawings of this patent and also the drawings of the defendant's patent, together with the drawings of the anticipating prior patents relied on by defen-

dant are shown graphically on a single foldable sheet at the back of this brief, whereby at a single glance the Court may see and understand the constructions and issues involved.

From this graphic representation it will be seen that manifold books were old in the art at the time of the advent of the plaintiff into the field. Tripling books were old. Manifold books with *bound carbons* and record leaves made up of a plurality of separable parts were old; and *double-faced carbons* were old. All these manifold books operated on the principle of folding the record sheet one or more times on the carbon, according to the number of duplicate copies to be made at one writing.

Levison says in both his re-issue and in his original patent:

“My invention relates to an improved manifold receipt and record book for mercantile, railway, express or other business uses.

“The object of my invention is to provide a book of this character which shall be convenient in use, economical in the number of carbons required; which shall give secure protection against alterations and forgeries, and the sheets of which can be readily and conveniently placed on record after the impression has been taken.

“My invention therefore resides in the novel construction, combination and arrangement of parts for the above ends, hereinafter fully specified and particularly pointed out in the claims. *

* * Referring to my drawings it will be seen

that my improved manifold book is formed in sections, each section comprising in order, first, a carbon sheet 1, of about two-thirds the width of the book, then, below said carbon sheet 1 a number of sheets 2, the ordinary paper, the full width of the book, then a sheet 3 of hard, thick cardboard."

The description in the re-issue from thereon is different from that in the original patent. In the original patent Levison says:

"Each recording sheet is divided into *three parts* by vertical lines of perforations 4, said parts having suitable printed matter 5 and blank lines 6, whereon to transcribe the desired record."

He then states that the record sheets, stubs and carbons, "are all bound together to form a book."

The mode of operation in using one of these books is described by Levison in both the original and in the re-issue patent, as follows, lines 55-75:

"In use the record-sheet is first folded on the outer line of perforations 4, so as to cover about one-half of the carbon-sheet, and it is then folded in the same direction on the second line of perforations, so that the carbon is now folded inside of the record-sheet, as shown in Fig. 2. The record will now be written upon what was the back of the middle portion of the sheet when it was flat and unfolded, which will now, however, have come to the top. The carbon-sheet is double or carbonized on both sides, so that a copy of the record will be made upon each of the two terminal parts of the sheet. Also an inverted or backhanded copy of the writing will be formed upon

the back of each part, except the inner one. This latter feature gives additional security against subsequent alteration of the record, since it is difficult to erase and rewrite both the original and the reverse copy.”

Levison emphasizes in the succeeding paragraphs of his original patent especially the feature of the use of his backing to form a smooth writing surface, and also to protect the carbon paper and says in conclusion, lines 94-102:

“The cardboard backings are an important feature of my invention, since they permit a large number of sheets to be bound into a book with a small number of carbons without any danger of transmitting an impression from one sheet to another sheet. They are readily removable by means of the lines of perforations when all the sheets above them have been used.”

PLAINTIFF'S RE-ISSUE PATENT SUED ON.

(For drawing see plate at back of this brief).

The re-issue patent, in addition to embodying the matter of the first patent, the essential portions of which are quoted above, has without warrant, as we shall point out later, particularized that each record sheet, “outside the stub 7 is divided into three *substantially equal* parts”; (See lines 40-42, page 1, Levison re-issue patent), and in the second column of the patent there has been inserted the following paragraph bodily:

“It has been already stated that the three separable parts of each recording-sheet are substantially

equal. They are not exactly equal, since it is preferable to provide the innermost part with an unprinted additional space or margin next the stub through which are punched the holes 9 to facilitate the filing of said part. Moreover, it is better to leave a small space between the edge of the sheet when folded and the line of perforations 8, as this renders it easier to fold the parts. With this exception the separable parts of each recording-sheet are of the same size and in general will contain identical printed matter thereon."

The only basis for claims 3-4-5 sued on depends entirely on these insertions. Consideration of their import and their effect on the re-issue will be deferred until we take up that phase of the matter in the argument.

THE PRIOR ART.

THE BARLOW PATENT.

(For drawing see plate at back of this brief).

This patent is defendant Exhibit 1, and appears on page 306 and following, of the Record. It was issued April 29, 1884, and expired 17 years thereafter or 7 months before Levison filed his original application on December 4, 1901.

The Barlow book is a triplicate book with record sheets divided into the three separable parts exactly as in Levison and using a double-faced carbon two-third the length of the record sheet, just as in Levison. The one difference is that the Barlow carbon is a loose carbon and Levison is a bound carbon.

(With reference to the Barlow drawings, it is to be born in mind that the book of Fig. 1 in Barlow and the illustration of the carbon "F" are not on the same scale. The carbon is of sufficient size to cover section A and B of Barlow's record sheet.)

The Barlow patent is for "A device for Manifold Copying". The patentees say:

"Our invention relates to an improvement in devices for manifold copying, the object being to facilitate the preparation of duplicate copies of writing by reducing the number of detached copying and blank sheets to the minimum.

"With these objects in view our invention consists of blank sheets divided into three equal sections by lines of perforations, and printed in the manner herein shown and described, whereby the sections may be folded upon each other with a single sheet of copying-paper in such manner that matter written upon one section will be reproduced upon the other two."

Their invention is described, as follows:

"The blanks are divided into *three equal sections*, A, B, and C, by lines E of perforations, which adapt the sections to be folded upon each other, and to be separated and distributed as required. The sections A and C are printed upon the same face of the blank, while the section B is printed upon the opposite face thereof."

This printing of the record sheet of Barlow and the illustration of the manner of printing coincide exactly with the Levison drawing and book, as will be

seen by comparing the two adjacent plates at the back of this brief. Barlow's carbon or copying sheet "F" is "carbonized on both sides", but Barlow says:

"Paper carbonized on one side will do as well, though perhaps not quite as convenient to handle."

The manner of manipulating the Barlow book is described by the patentees as follows:

"In using the paper having both faces carbonized, a *sheet of sufficient size to cover two of the three sections* of each blank is employed. Such a sheet is laid over the printed side of section A and the unprinted side of section B. *The section C is now folded to the left and laid upon the copying-paper covering the unprinted side of the section B. Then the two sections B and C, with the interposed copying-paper, are folded to the left and laid upon the copying-paper covering the section A. The printed surface of the section B becomes the uppermost, as the result of folding the blank in the manner described, and this section is accordingly written upon with a pencil, and the matter written is duplicated upon each of the sections A and C.*"

The patentees then point out the advantage of the use of a single sheet of carbon paper producing triplicate copies in the following language:

"*It will be seen that with one blank sheet, and with a single sheet of carbon-paper, two duplicates of the written matter are produced, whereas two detached sheets of copying-paper have heretofore been necessary to get the same number of copies.* The old method is objectionable on account of the number of sheets

to be adjusted and cared for, and to the shipping-clerk, who carries the sheets from place to place, the handling and care of the sheets is a source of great annoyance.”

The marked similarity between the construction, mode of operation and results to be accomplished by Barlow and Levison is manifest on the face of the two patents.

Mere inspection of the Barlow patent at once discloses all the features of Levison in so far as the claims here sued on are concerned, except that the limitation is imposed upon Levison that his carbon and record sheets must be “bound”. The single claim of Barlow is as follows:

“An improved blank for manifold copying, consisting:

“1—of a sheet of paper,

“2—divided into *three equal sections*,

“3—by lines of perforation,

“4—and printed in the same manner herein shown and described,

“5—whereby the sections may be folded upon each other with a *single sheet of copying paper*,

“6—in such manner that matter written upon one section will be reproduced upon the other two, substantially as set forth.”

Obviously, the above exactly describes the Levison device.

It is elementary that, “That which infringes if later would anticipate, if earlier”.

Muller vs. Eagle Mfg. Co., 151 U. S. 186;

Eames vs. Worcest Polytechnic Institute, 123 Fed. 67.

THE DOUGHTY PATENT.

Drawings of this Doughty patent are shown on the plate at the back of this Brief and is represented by defendant's model Exhibit 10.

The Doughty invention is for "a manifold book".

He says in his specifications:

"My invention relates to improvements in manifold sales-books; and the object is to provide a triplicate book that will be simple and convenient."

He shows two styles of book, one style in Figs. 1 and 2 which corresponds to our model exhibit 10, and Fig. 4 shows a modification, with which we are nowise concerned. However, the plaintiff, with what purpose we cannot understand, unless it was to befog the issue and mislead the Court, has introduced in evidence a model marked "Exhibit Q", which shows the two single carbon arrangement of Doughty's Fig. 4. It seems apparent to me from reading the Opinion of the Lower Court that the Trial Judge did mistake this Exhibit Q, Fig. 4 as being the Doughty device, relied on by the respondent. Fig. 3 is to be read with Figs. 1 and 2 on an enlarged scale, with the cover A and clamp A, lacking. The difference between the preferred form of Doughty shown in Figs. 1 and 2 and the modification of Fig. 4 is pointed out by the patentee, as follows:

“In the first two figures of the drawings the clamp A' is secured to the inner side of the cover on the right-hand side of the hinge. The *bound* ends of the leaves are held in this clamp with their free ends extending to the right, but with their end sections *b''* turned inward and lying on their respective central sections *b'.*”

In Fig. 4 the clamp A' is on one end of one leaf, 2 carbons are used instead of one, as in Figs. 1 and 2, and the arms *d'* are hinged to one cover between the clamp A and the middle of the book, while in *Fig. 1* these arms which carry the double carbon are hinged to the cover at a distance from the center of the book equal to the length of two of the leaf sections. The construction and mode of operation of the Doughty structure shown in Figs. 1 and 2, *and that is the only structure that is pertinent to this consideration*, is given by the patentee as follows:

“The full leaves B are each divided into three sections *b, b', and b''* and a stub *b'''* by perforated lines *c, c' and c''* and these sections, when folded on the said lines with the carbon-sheet inclosed, form at one writing three distinct copies, *b'* being the original, *b''* the duplicate, and *b* the triplicate, which latter can be retained in the book or removed, as desired.

“The *carbon sheet C* is as wide as the leaves, as long as two of the sections, and is carbonized on both sides. Said carbon-sheet is held by a clamp D at one end, the clamp being mounted on the free ends of arms *d d*, turning in eyes, *e e*, secured to the inner side of the cover, near its right-hand edge.

“In using the form of book shown in the first three figures of the drawings the end section *b*” of the uppermost leaf is raised to allow the end of the carbon-sheet *C* to drop onto the underlying section, as shown in Figs. 1 and 2, and then the sections *b*” and *b*’ together with the end of the carbon-sheet, is folded on the perforated line *c*’ over upon the other section *b*, as indicated in Fig. 3 of the drawings. Any writing that is made upon the central section *b*’ will be copied on the other two sections of the leaf. After the writing one or all of the sections written upon may be torn out, leaving the next full leaf in position for a like manipulation.”

Harry Levison, one of the officers of the plaintiff’s company, testified that the Doughty carbon was a “bound” carbon. Page 251-254:

“XQ. 28. And they are *all bound together with stubs and carbons to form a book?*

“A. Yes, it *all forms a book; yes*. I will say for your benefit that the patentee of that book is trying to get at the proposition of binding a carbon to a book so that it could be easily handled, but that he has got a very awkward maner of binding the carbon to the book, and a very awkward manner of handling the carbon.”

So the best excuse Levison can offer to Doughty is that it is “awkward.” Otherwise it is admitted to be a complete anticipation. In legal contemplation mere “awkwardness” does not militate against a patent being a good reference for a later one; nor does the law recognize as invention mere change in “form, pro-

portion or degree" which may make the later structure somewhat more convenient. *Galvin vs. City of Grand Rapids*, 115 Fed. 511 C. C. A.; *Babcock & Wilcox Co. vs. Toledo etc. Co.*, 170 Fed. 81 C. C. A. "Convenience" anyhow is a good deal a matter of personal opinion.

Levison also testified, page 255:

"A. When you lay your carbon down, when you place your carbon in position, it extends the width of two, except the outermost.

"XQ. 30. And we also have in this Doughty Exhibit 'P' a plurality of recording sheets, each recording sheet outside of the stub being divided into a plurality of not less than three of separable parts joined along lines of perforations? You have stated that; each part being not greater than the part next it on the side toward the stub; is that not true?

"A. Yes."

From the foregoing it appears that every element of the Levison claims sued on, is apparent in Doughty.

"That which infringes if later, would anticipate if earlier."

ABRAHAM PATENT.

This patent is defendant's Exhibit 3, and is shown on the plate at the back of this brief.

This Abraham book is a manifolding book, and the patent was issued more than two years prior to the date of the application of Levison. While in style it is somewhat different from that of the patents previously referred to, it is nevertheless a manifolding

book and is mainly pertinent as showing record leaves divided into three sections, and using a “bound” carbon adapted to be interfolded with the sections.

The patentee says:

“My invention relates to that class of sales-book in which a leaf of carbon-paper is adapted to be inserted between two adjacent leaves, whereby an original and a carbon copy of the sales-memorandum can be produced and the sheets be detached from the book and from each other, so that the customer may receive one record and another be retained at the store.

“My improvements consist generally in dividing each half of a folded sheet of a manifold sales-book into *three sections*, the top and bottom sections having provision for the name and address of the purchaser and the intermediate section having provision for memorandum of sale and amount of same and the bottom section also having provision for the amount of sale and said sheet having lines of detachment between the top and intermediate sections of the upper half and between the bottom and intermediate sections of the lower half.”

This patent clearly shows that “bound” carbons were old and well-known before Levison’s invention.

In his claim 2 Abraham includes as an element, “a carbon leaf *bound* into the book and adapted for insertion under the upper half of the folded sheet, each half of said sheet being divided into *three sections*.”

BENGOUGH PATENT.

This patent is shown in defendant's Exhibit 7, and a drawing of it is shown on the plate at the back of this Brief.

This patent was introduced to show the state of the art as relating to bound carbons. The patentee says:

"My invention relates to improvements in manifold sales-books; and the object is to provide a more simple and inexpensive book that will be both serviceable and convenient."

Again lines 70 to 75, he says:

"One side edge of the originals *B* is *bound* by the same staples *a* to the double leaves, the two black or carbon leaves *D-D'* being *bound* between the two series of leaves."

The claims of Bengough refer to *bound* carbons and *bound* leaves "substantially as described and shown."

PERRY PATENT.

This patent is defendant's Exhibit 6, and is illustrated on the plate at the back of this Brief and shows another form of manifold, triplicate sheet using a *single* double-faced carbon.

Perry says:

"My invention relates to manifold receipt and record books for mercantile, railway, express and other business uses."

Perry further says that the object of his invention is the "production of a manifold-copying sheet or book of such sheets, so constructed that by the use

of a single sheet of carbon-paper interposed between the folds of said sheet a plurality of impressions may be obtained from a single writing, one of which will be upon the portion of said sheet designed to be retained as a permanent record and the balance upon the detachable remainder of said sheet; and a further object of my said invention is to cheapen the cost of manufacturing books and sheets of this general nature."

In conclusion he says:

"By the use of my invention I avoid the necessity of printing the sheets upon opposite sides thereof, thereby effecting a great saving in the cost of manufacture and am enabled to obtain perfect triplicate copies with the use of a single sheet of carbon-paper."

It seems to be quite common for all of these patentees to claim the advantage of economy and simplicity, and the use of a single carbon, and they evidently filled the "want" which called their invention into being. Some preferred bound carbons, some unbound carbons; some double carbons and some single carbons.

DEFENDANT'S BOOK AND PATENT.

Defendant's book is represented by complainant's Exhibit A, and is built under and in accordance with patent No. 911,597, dated February 9, 1909, and issued to Mr. Kitchen, President of the defendant company. The drawings of the patent are illustrated on the plate at the back of this Brief.

Defendant's book is made up of a series of sheets divided into three parts, just as in Barlow, Doughty and Levison. Defendant uses a double-faced carbon, two-thirds the length of these record sheets, just as in Barlow, Doughty and Levison.

Defendant's carbon however, is attached to a separate piece of cardboard 9, which is notched out so that it may be inserted anywhere into a book after the latter is bound up and by the frictional engagement of the stubs is held temporarily in place. It is readily removable just as Doughty or Barlow, and as far as being "secured in the book," it would stand midway between Barlow and Doughty; Barlow typifying a (loose) carbon in its general sense, and Levison typifying a *bound* carbon, with the Doughty patent intermediate of the scale between Levison and Kitchen; that is to say, the Barlow, Kitchen, Doughty and Levison patents are all in the *genus*, or general class of manifolding books; this genus being divided into *two species*, one of "loose carbon books", and the other of "bound carbon books".

Barlow, Perry and defendant belong to the class of "loose" or "unbound" carbons; and Doughty, Abraham, Bengough and complainant belong to the class of "bound" carbon books. This is a distinction that we have heretofore maintained prevails in the art, and it is the proposition that we purpose to maintain on this Appeal.

The Court should not be misled as to the purpose and character of many of the exhibits in the case because the complaintant has placed great reliance on a

lot of manifolding books and devices, (particularly exhibits D, E, F, G, I, K, O, S, T, U, V, W, X, Y, Z, AA, BB), introduced by him.

These exhibits were all introduced by the complainant over the objections of defendant. Levison would have the Court believe that these devices constitute the real prior art. They do not represent the prior art in any true sense and represent nothing that this defendant relies upon. Of course they are generally as far from the complaint's device as they well could be imagined to be, and if these "transparent sheet books" and "two-piece single carbons" and "torsion binders" were all there was antecedent to the Levison patent it would be a simple matter to hold that Levison had possibly invented something. These exhibits of complainant were lugged in on rebuttal by complainant apparently for the simple purpose of befogging the issue. Their presence in the case would make it appear that they constituted the basis of the defense of anticipation. Complainant would even have this Court believe that Exhibit O represents the Brown patent, defendant's Exhibit 4. As a matter of fact Brown was introduced by defendant solely for the purpose of showing Brown's *stop card* D which is the same as that used by defendant (but on which stop card Brown has no special claim). Brown however became of no importance as a defense as soon as the complainant abandoned his claim to infringement of claims 1 and 2 of the Levison patent. It was with respect to these two claims and those only wherein a "stop card" formed an element, that

Brown was introduced. Claims 3-4-5 on which the complainant elected to rest its case have nothing what so ever to do with any “stop card” or “cardboard backing”, but one simply limited to a *pad of leaves in which the leaves are divided into three sections, with a carbon bound into the pad.*

Therefore in considering the *prior art* the Court will please bear in mind, that it is not the defendant who has sought by this heterogenous mass of exhibits above mentioned, of complainant, to show anticipation; but that this defense is embodied in the Barlow Doughty, Abraham, Bengough and Perry patents above mentioned. These five patents (and in fact most any of them singly) culled from hundreds of other patents in this overcrowded art (overcrowded at the time of Levison’s debut into the field) we claim are sufficient to show that so far as claims 3-4-5 are concerned Levison invented nothing.

These patents are sufficient to indicate the evolution and development of the means for reproducing duplicate and triplicate tags by a single writing on an original, and go to show that years before the date of the patent in suit it was notoriously common to reproduce three carbon copies in exactly the same way, for the same purpose and by the same means as complainant appellee does in his patent sued on. ‘The art was already crowded with patents for manifolding books generally and triplicating books especially having *bound* carbons at the time of the complainant’s alleged invention. Notwithstanding this condition of affairs which rendered the Levison pat-

ent of most marginal character and the further fact that the complainant himself admitted that he did not claim a *duplicate* book with a bound carbon, but only claimed a book for *triplicating* or quadruplicating purposes using a *bound* carbon, pages 50-51, the Court below gave the patent in suit a broad and liberal construction and enjoined the defendant as an infringer and ordered an accounting.

The defenses are:

- 1—want of invention,
- 2—anticipation,
- 3—that the Levison patent is void as a re-issue,
- 4—non-infringement.

ASSIGNMENT OF ERRORS.

The errors assigned on which this appeal is based are set out on pages 271-3 of the Record and are as follows:

“1. That the Circuit Court of the United States for the Northern District of California erred in holding that the claims of complainant’s patent, and especially Claims 3, 4 and 5 sued on, were, or any of them, valid.

“2. That the Circuit Court of the United States for the Northern District of California erred in holding that the claims of complainant’s patent, and especially the claims sued on, were not each and all anticipated by the prior art.

“3. That the Circuit Court of the United States for the Northern District of California erred in holding that complainant’s patent, with especial refer-

ence to the claims sued on, presented patentable novelty in view of the Barlow, or Doughty, or Abraham patents.

“4. That the Circuit Court of the United States for the Northern District of California erred in holding that the claims of complainant’s patent sued on, or either of them, represented a patentable invention.

“5. That the Circuit Court of the United States for the Northern District of California erred in holding that complainant’s patent was not void as a reissue.

“6. That the Circuit Court of the United States for the Northern District of California erred in holding that complainant’s patent, and especially the claims sued on, and each of them, or any of them, were entitled to a liberal construction and application of the doctrine of mechanical equivalents.

“7. That the Circuit Court of the United States for the Northern District of California erred in holding, in view of the prior art, that the defendant’s device did not represent a distinct, different and independent invention from complainant’s.

“8. That the Circuit Court of the United States for the Northern District of California erred in holding that the loose carbon of appellant was the equivalent of the bound carbon of complainant appellee.

“9. That the Circuit Court of the United States for the Northern District of California erred in holding that complainant’s patent was infringed.

“10. That the Circuit Court of the United States for the Northern District of California erred in enjoining the respondent.

“11. That the Circuit Court of the United States for the Northern District of California erred in sustaining the bill of complaint.”

BRIEF

BRIEF

MEMORANDA.

The Levison book with respect to the claims sued on (3-4-5) does not represent a patentable invention.

INVENTION.

It is not enough that the thing shall be new in sense of form or shape and be useful, but it must amount to an invention.

Hill vs. Wooster, 132 U. S. 693, 701.

In Slote & Co. vs. Stratton Co., 159 Fed. 485, 481 (a case involving a blank book), it was said:

“Not all improvements are invention. There must be something more. *Loom Co. vs. Higgins*, 105 U. S. 591, 26 L. Ed. 1177; *Pearce vs. Mulford*, 102 U. S. 112, 26 L. Ed. 93; *Burt vs. Ecory*, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647; *Dodge Coal Storage Co. vs. N. Y. C. & H. I. R. Co.*, 150 Fed. 738, 80 C. C. A. 404. It is not necessary to find the precise process or structure in the prior art. It is all-sufficient if we find the path open, made so clear that the ordinary mechanic skilled in the art would see and construct and apply.”

PRIOR ART.

Barlow, 1884: shows triplicate book and single double-faced carbon. Everything that Levison has except that Barlow's carbon is *loose* and not *bound*.

Doughty, 1898: shows a triplicate book with single double-carbon attached to the book and “*restrained*” so it can not fall out. This is admitted by Harry Levison to be a *bound* carbon and in the sense contended for by complainant it absolutely meets the claims sued on.

Perry, 1896: shows a triplicate book with double-faced loose carbon, but folded somewhat differently from any of the other patents.

Abraham, 1899: shows a bound carbon with leaves divided into three or more separable parts. It exactly fits the Levison claims, except as to the *proportional size of the divisible parts* of the leaves.

Bengough, 1896: shows a duplicate book with bound leaves.

ALL THAT LEVISON DID WAS TO BIND THE ABRAHAM CARBON IN THE BARLOW BOOK.

HIS SO-CALLED INVENTION WAS MERE DOUBLE USE.

The transfer of a device from one “art” to another where it performs the same functions as before is not invention:

Standard Caster Wheel Co. vs. Caster Socket Co., 113 Fed. 162, C. C. A.

Ransome vs. Toledo etc. Co., 172 Fed. 371
165 Fed. 914.

NEITHER THE BARLOW PATENT NOR DOUGHTY WERE CITED BY THE EXAMINER DURING THE PENDENCY OF THE LEVISON RE-ISSUE APPLICATION.

This weakens rather than strengthens the patent:

Cleveland Foundry Co. vs. Kauffman;
C. C. A.;

Cleveland Foundry Co. vs. Kauffman;

Amer. Soda Fountain Case vs. Sample, 130
Fed. 145, C. C. A.;

Elliott Co. vs. Youngstown Car Co. 181 Fed.
145, C. C. A.;

Pope Mfg. Co. vs. Arnold Schwinn Co., 177
Fed. 419.

**CLAIMS 3, 4, 5, SUED ON ARE IDENTICAL AND ALL
CAN NOT BE VALID.**

“Mere change in form, proportion or degree is
not invention”:

Smith vs. Nichols, 21 Wall 112; 22 L. Ed. 566;

Neureuther vs. Ceneral Paint Zinc Co., 179
Fed. 851, C. C. A.

**MERE COMMERCIAL SUCCESS OF COMPLAINANT'S
BOOK (AND ITS SUCCESS IS SHOWN NOT TO BE NEAR
AS GREAT AS HE CLAIMS IT TO BE) IS NO CRITERION
OF INVENTION WHEN THE PATENT IS VOID OR WHERE
THE SUCCESS MAY BE ATTRIBUTED TO OTHER
CAUSES.**

As was said by Judge Hawley, in this circuit,
speaking for the Circuit Court of Appeals, in the

case of *American Sales Book Co. et al. vs. Bullivant*, 117 Fed. 255, 259:

“The mere fact that a patented device or article meets with increasing sales and is popular, is wholly unimportant when it clearly appears that the invention is without patentable novelty.” (Citing cases.)

“Much stress has been laid upon the commercial success of the Grant tire. Aside from the fact already mentioned, that much of the durability of the tire is due to the better quality of rubber used, *there is much evidence that this success is largely attributed to the power of great capital in buying or crushing out rivals, and to great business push and advertising.* . . . The general use of a patented article is only evidence of value when the novelty or utility of the article is a matter of great doubt, and *its evidential value in even such cases is nothing when it can be attributed to something other than novelty. Watch Case Co. vs. Robbins*, 21 C. C. A. 199, 75 Fed. 17; *Lane vs. Welds*, 39 C. C. A. 528, 99 Fed. 286; *McClain vs. Ortmyer*, 141 U. S. 419, 12 Supt. Ct. 76, 35 L. Ed. 800.”

Goodyear Tire & Rubber Co. vs. Rubber Tire Wheel Co., 116 Fed. 363, 377, C. C. A.;

See also *Boss Mfg. Co. vs. Thomas*, 182 Fed. 811, C. C. A.

THE RE-ISSUE IS VOID BECAUSE:

1—it is not for the “same invention” as the original,

2—it introduced new matter into the specification,
 3—the amendments adding the new matter were
 not substantiated by an oath of the investor as re-
 quired by law.

Acetylene Burner Case, 215 U. S.—reported in
 U. S. Sup. Ct. advanced sheets No. 3 for
 Jan. 1, 1910.

**THE LEVISON PATENTED DEVICE IS A CLEAR IN-
 FRINGEMENT OF THE BARLOW CLAIM.**

Therefore in so far as Barlow does not actually an-
 ticipate Levison, it limits Barlow to his exact struc-
 ture and therefore respondent whose carbon is sep-
 arately patented, does not infringe.

Holt Mfg. Co. vs. Best Mfg. Co., 172 Fed. 409,
 C. C. A., 9th Cir. opinion by Judge Ross.

**IF THE CLAIMS OF LEVISON ARE TO BE SUSTAINED
 AT ALL, THE SPECIFIC CONSTRUCTION SHOWN IN HIS
 DRAWINGS AND DESCRIBED IN HIS PATENT MUST BE
 IMPORTED INTO THE CLAIMS, AND THEREFORE LEVI-
 SON IS LIMITED NARROWLY TO HIS EXACT DEVICE.**

Consolidated Roller Mill Co. vs. Walker, 138
 U. S., 34 L. Ed. 920-923;

McCarty vs. Lehigh Valley R. R. Co., 160 U.
 S. 116;

Lewis Construction Co. vs. Semple, 177 Fed.
 407, C. C. A. (this circuit).

**THE ISSUANCE OF RESPONDENT'S PATENT RAISES
 A PRESUMPTION IN HIS FAVOR, NOT ONLY OF PATENT-**

**ABLE DIFFERENCE, BUT IN VIEW OF THE PRIOR ART,
OF NON-INFRINGEMENT.**

Corning vs. Burden, 15 How. 252, 14 L. Ed. 683-691;

Royd vs. Janesville Hay Tool Co., 158 U. S. 261, 39 L. Ed. 973-975;

Kokomo Fence Co. vs. Kitselman, 189 U. S. 8, 49 L. Ed. 689;

Taber vs. Marceau, 87 Fed. 871 (opinion of Judge Morrow).

INFRINGEMENT.

Under no view of the case should the respondent be held to infringe. Levison claims a "bound" carbon and respondent uses a loose or unbound carbon.

When an invention is not a pioneer invention, the inventor is held to a rigid construction of his claims, (*Wright vs. Yuengling*, 155 U. S. 47, 15 Sup. Ct. 1, 39 L. Ed. 64), and is not entitled to any considerable range of equivalents (*Kokomo Fence Machine Case*, 189 U. S. 8, Sup. Ct. 521, 47 L. Ed. 689; *Cimiotti, etc. vs. American F. R. Co.*, 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1110; *Computing Scale Co. vs. Automatic etc.*, 204 U. S. 609, 27 Sup. Ct. 307, 51 L. Ed. 645), but still the range of equivalents depends upon the extent and nature of the invention (*Paper Bag Patent Cast*, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122; *Miller vs. Eagle M. Co.*, 151 U. S. 207, 14 Sup. Ct., 310, 38 L. Ed. 121.) And when, in a patent for a mere

improvement, which, in view of the prior art, is extremely narrow, the patentee has limited his claims by specific words to a specific form of device or element, he is bound thereby. *Coupe vs. Royer*, 155 U. S. 565, 15 Sup. Ct., 199, 39 L. Ed. 263; *McClain vs. Ortmyer*, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800; *Burns vs. Meyer*, 100 U. S. 671, 672, 25 L. Ed. 738; *Keystone Bridge Co. vs. Phoenix, etc.*, 95 U. S. 274, 278, 24 L. Ed. 344.

“**BIND**: To *sew* or *fasten* together and inclose in a cover; as to *bind* a book.”—*Webster’s International Dictionary*.

“**BINDING**: The cover of a book with the *sewing* and accompanying work.”—*Century Dictionary*.

“**BOOK**: A collection of paper leaves *sewed* or *bound*, used for any kind of writing.”—*Worcester*.



ARGUMENT

ARGUMENT.

His Honor, Judge Van Fleet, in sustaining the Levison patent necessarily held that it involved invention.

Invention, as found by him, appears to have been predicated mainly on the simplicity and practicability of the Levison device, and on an imperfect and apparently incorrect conception of the prior art, and of the law governing patentable invention. This criticism is made with all due respect to this Honorable Court and to the Court below.

In approaching this question, we think it proper to define, "What is Invention"?

INVENTION.

Walker says, Sec. 23, on the topic of Invention:

"Novelty and utility must indeed characterize the subject of a patent, but they alone are not enough to make anything patentable; for the statute provides that things to be patented must be invented things, as well as new and useful things. The courts have therefore declared that not all improvement is invention, and entitled to protection as such, but that to be thus entitled, a thing must be the product of some exercise of the inventive faculties."

Justice Matthews for the Supreme Court in *Hollister vs. Benedict Mfg. Co.*, 113 U. S. 72, in speaking of a simple device which the Court held not to be an invention, said:

"It seems to us not to spring from that intuitive faculty of the mind put forth in search for new re-

sults or new methods, creating what had not before existed, or bringing to light what lay hidden from vision; but, on the other hand, to be the suggestion of that common experience which arose spontaneously, and by a necessity of human reasoning, in the minds of those who became acquainted with the circumstances with which they had to deal.

“It is not invention to produce a process, machine, manufacture composition of matter or design which any skillful mechanic, electrician, chemist, or other expert would produce whenever required.”

Walker, sec. 25.

In holding a patent to be void the Supreme Court, in *Atlantic Works vs. Brady*, 107 U. S. 199, speaking by Justice Bradley, said:

“The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention somewhat above ordinary mechanical or engineering skill is distinctly shown, is unjust in principle and injurious in its consequences. The design of the patent laws is to reward those who make some sub-

stantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It is never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith.”

After quoting the above, Walker says:

“This opinion of Justice Bradley is now a classic. Many federal judges, during twenty years, have administered it as law; and some have paraphrased it in sound and suggestive language of their own. For example, Judge Philips has said that: ‘In this day of increasing demand for new and enlarged mechanical appliances, the first natural result is the production of a large class of skillful and experienced mechanics and artisans, and, second, a more studious and constant development in applied mechanics.

And as such advance plainly points out, to the attentive and assiduous workman, the natural, larger, practical adaptation of existing, known mechanical devices; to invest each one of these developments with the immunity of a monopolizing patent, would not only be a perversion of the term ‘“invention”,’ but would utterly extinguish the doctrine of mechanical equivalents.’ And Judge Coxe has said that a chemical patent is addressed to accomplished chemists and ‘That which seems, to the ordinary layman, to involve the exercise of extraordinary mental power, is to these men nothing but the everyday work of laboratory routine.’ And Judge Townsend has said that an electrical patent should be stripped of the dazzling halo which conventionally adorns appliances designed to deal with that mysterious agent, electricity; when a court is called on to decide the question of the presence or absence of invention, in an electrical patent.

“Nearly a hundred other cases, involving the rule of this section, have now been adjudicated and reported.”

It does seem to even a casual observer that Levi-son has claimed “a shadow of a shade of an idea” in his re-issue by even attempting to get a patent on a “bound” carbon over Barlow.

“Invention” is often defined negatively. The present case illustrates the oft-repeated rule of the courts “that mere change in form, proportion or degree or the carrying forward of an old idea is not invention. As recently said by Judge Seaman in

Neureuther vs. Mineral Paint Zinc Co., 179 Fed. 851, C. C. A.:

“Through the above-recited evolution of furnace building and trial, in the plant of the Illinois Zinc Company, Neureuther achieved superior results in the three-port form of furnace, as an improvement both on the original Siemens device and on his own two-port furnaces, after the latter had continued in practical operation for about seven years. The outcome of his efforts was an improved zinc-smelting furnace of the Siemens type, and its superiority over other forms of furnace, at least in economy of fuel and space, appears from the testimony. Were the new and useful qualities of the three-port furnace, therefore, the test of patentality, no difficulty would appear in upholding the patent; but invention is the test which must be applied, and for solution of that inquiry under the facts stated, we believe one rule to be well settled and applicable, namely: That ‘a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent.’

“*Smith vs. Nichols*, 21 Wall. 112, 119, 22 L. Ed. 566;

“8 Notes U. S. Rep. 389;

“*Wilce vs. Bush Temple Music Co.*, 134 Fed. 389, 391, 67 C. C. A. 371.”

It would not involve invention to bind the double-folded single carbon of Barlow into the stubs (particularly in view of Abraham or Doughty or Bengough), on the general principle of patent law that it is not invention *to make in one piece and article which has formerly been made in two pieces*; considering Abraham a “one-piece” book and Barlow a “two-piece” book.

Howard vs. Detroit Stove Works, 150 U. S. 164.

“Moreover, it has been held that invention is not disclosed by merely making in a single piece a device or connection which previously had been made of separate parts. *General Electric Co. vs. Yost Electric Co.* (C. C.) 131 Fed. 874, affirmed 139 Fed. 568, 71 C. C. A. 552.”

Keepers vs. Amer. Elek. Fuse Co., 177 Fed. 442.

We respectfully urge upon the Court that the patent of Levison in so far at least as the claims here sued upon are involved, does not and never did at any time subsequent to the Barlow patent, present a patentable invention. As before pointed out, it is to be clearly kept in mind that the issue involved on the point of invention, is whether it was invention at the time of Levison’s invention to bind a carbon in with the leaves; the leaves being divided into three

sections and the carbon to be double-faced and two-thirds the length of the leaves; remembering that Barlow used the same leaves and carbons without binding; that Doughty used the same leaves and carbons and permanently held the carbon and book together and that the various other patents showed bound carbons with the leaves divided into various sections, three, four, or more, according to the desire or whim of the patentee.

His Honor in the Court below, said:

“As to the defense of want of invention by reason of anticipation, it appears that the prior history of the art is made up of a large number of devices theretofore patented wherein it is disclosed that it has been the aim, object and desire of those interested for a great many years, a quarter of a century perhaps, to attain some simple device by which in manifold books of this character the use of carbon paper may be had under conditions which would avoid the necessity of handling it and having it in loose sheets, as it had existed for a great many years, because of its unpleasant nature and the inconvenience.”

His Honor Judge Van Fleet has no doubt been misled as to the true prior art by the vast mass of books presented on rebuttal, the introduction of which was objected to at the time by defendant's counsel.

In reply we would say, that Abraham and Bengough had both discovered the simple device of binding the carbon; that Doughty had a bound carbon

according to Levison's own testimony and the testimony of defendant's expert, Mr. Maynard, p. 105:

"Q. 116. State whether or not the stubs in the Doughty and one side of the carbon sheet and backing are bound together to form a book.

"A. Yes, the carbon in this case is bound with the leaves and backing to form a book."

But the testimony also shows that fixed carbons or bound carbons were not an unmixed blessing nor an ever-existing desire; not only as shown by the Barlow and Perry patents, but by the evidence of Mr. E. F. Crandall and Mr. John Kitchen, Jr.

Mr. Crandall has had many years' experience with the well known house of Cunningham, Curtis & Welch, the largest dealers in and manufacturers of stationary supplies on the Pacific Coast.

Mr. Crandall, p. 78:

"RDQ. 8. Will you state what proportion of your customers ask for fixed carbons with triplicate sheets, and what proportion ask for loose carbons in triplicate sheets."

"Ans. Q. 8. *Probably 1% want the carbons bound in the book.*"

Again on page 66, Mr. Crandall was asked on cross-examination:

"XQ. 27. Do you know whether in the use of these triplicate books and duplicate books parties using the same object to the carbons being loose and not bound in the book?

"A. Oh, some of them prefer it bound, and some loose. We make it both ways.

“XQ. 28. Why do they prefer it bound in a book?

“A. It is a little easier to handle.

“XQ. 29. In what way are they easier to handle?

“A. Well, they don't handle the carbon every time. They turn the leaf over, you know. Of course, in a book like that, where the carbon is bound in, to work on the next leaf you must tear out the first leaf, you understand. Now, in a great many books where the original sheet would stay in the book you can't bind the carbon in because it would interfere with the next carbon copy. It is only once in a great while that we have to bind the carbon in the book.”

Again on page 70, Mr. Crandall was asked on cross-examination:

“XQ. 44. Would you consider it an advantage to have the carbon held in place in these triplicate books rather than to have them loose as they are in some forms of this book?

“A. Well, as I said before, the only advantage would be to keep the man from holding the carbon, to have them exempt from soiling their hands with the carbon. There is no advantage in it. I don't see any advantage in it myself.

“XQ. 45. But of course you realize that a great many people differ with you as to certain advantages?

“A. Oh, yes, certainly. We make books in any way that a man wants without any question as to the whys or wherefores.”

Mr. Kitchen, who has been in the printing business for over 20 years, states that even when he was an

apprentice he bound up thousands of the Barlow books with loose double-faced single carbons, and he was asked on page 159:

“Q. 26. Have you ceased to manufacture those books?”

“Ans. No, we have not. We make those books to-day; many of the Barlow books today.”

He went on to testify how only recently he had filled an order for Barlow books for the firm of A. Schilling & Co., the well known merchants of this city, and a specimen of this Barlow book, such as actually in use today by A. Schilling & Co., was introduced as defendant's Exhibit 13, p. 160.

Mr. Kitchen further testified:

“Q. 34. Have you any idea how many of those books, the Barlow, you make?”

“A. Well, that would be impossible to tell. We have never kept any data, but hardly a week goes by unless we have some form of triplicate books in, similar to the Barlow.

“Q. 35. State whether or not the books such as exhibit 13, corresponding to the Barlow patent, are now in general use or not.

“A. They are.

“Q. 36. Are they used by more firms than A. Schilling & Co., in this city?”

“A. Oh, my! There are *numerous firms use them*.

“Q. 37. Are there more firms than yours? Are there other firms than yourself making these books today in this city?”

“A. *Yes, every bindery in San Francisco makes them, and every printing office.*”

Verily, it cannot be said that Levison was the first to achieve the “end long sought,” or to have taken “the last step that wins,” for we see from the record that it isn’t everyone that wants *bound* carbons even in a special triplicate book, and that the old loose carbon or Barlow is still in extensive use today and “every bindery in San Francisco makes them and every printing office.”

AGGREGATION.

Aggregation is not invention. “It is a commonly accepted rule of patent law that the inventive idea is not ordinarily present in the conception of a combination which merely brings together two or more functions to be availed of independently of each other. The mechanism which accomplishes such a result and no more is ordinarily styled a mere aggregation.” *Osgood Dredge Co. vs. Metropolitan Dredging Co.*, 75 Fed. 670.

“A combination, to be patentable, must produce a single new and useful result, or an old result in a better and cheaper manner, as the product of the combination; and where the combination produces an aggregate of two or more results, each the complete result of one of the combined elements, it does not constitute a patentable combination.” *Wellman vs. Midland Steel Co.*, 106 Fed. 221.

The law on this subject is well settled and the dividing line between combinations and aggregations is

well established. Every case must fall on one side or the other of that line, and no case can stand upon it.

It was not invention on Levison's part to bind the *Abraham* carbon in the Barlow book. It was mere unpatentable aggregation as distinguished from patentable combination. See *Brinkerhoff vs. Aloe*, 146 U. S. ,15, 516, 13 Sup. Ct. 221, 224 (36 L. Ed. 1068), where it is said:

“To sustain a patent on a combination of old devices it is well settled that a new result must be obtained which is due to the joint and co-operating action of all the old elements. Either this must be accomplished, or a new machine of distinct character and function must be constructed. *Pickering vs. McCullough*, 104 U. S.310, 26 L. Ed. 749; *Hailes vs. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241; *Tack Co. vs. Manufacturing Co.* (C. C.) 3 Fed. 26, 9 Biss. 258; *Wrangling Machine Co. vs. Young*, 14 Blatchf. 46, Fed. Cas. No. 9,508. *If several old devices are so put together as to produce even a better machine or instrument than was formerly in use, but each of the old devices does what it had formerly done in the instrument or machine from which it was borrowed and in the old way, without uniting with other old devices to perform any joint function, it seems that the combination is not patentable.*”

Safety Car H. & L. Co. vs. Consolidated Car H. Co., 160 Fed. 476, 490.

Query: What function did the binding means for the carbon in Levison perform different from the function performed by the binding means in Abra-

ham or Bengough? None; for in both cases it simply held the carbon in place with the leaves.

LEVISON'S SO-CALLED INVENTIVE ACT IS A CLEAR INSTANCE OF DOUBLE USE.

As to the obviousness of the use of bound carbon by Levison and its being a mere case of double use, the words of Judge Ray in the recent case of *Fellows vs. Borden Milk Co.*, 180 Fed. 421, 438, are apt:

“It seems to me clear that the new use (so far as there is a new use) of the devices of the prior art—this very industry of making cans—which includes every step and purpose of the Fellows patents, were so nearly analogous to the former uses in the same art, so closely allied, that the applicability of the devices to the new use would necessarily occur to a person of ordinary mechanical skill, and that this is a case of double use. The necessary changes and modifications of the old devices were so simple, so patent and obvious, and the results obtained, especially by the use of centrifugal force for throwing off solder which has been practically abandoned, of so little importance, that they would occur to any mechanic of ordinary skill in this art. In *Brown et al. vs. Piper*, 91 U. S., 37, 23 L. Ed. 200, the Supreme Court of the United States held that:

“ ‘The court can take judicial notice of a thing in the common knowledge and use of the people throughout the country.’ ”

The application of the bound carbon of Abraham's to the specific triplicate book of Barlow is at the ut-

most only a double use, not involving invention. It is rather a case of changing the particular leaves of Abraham's for the particular leaves of Barlow; or conversely changing the loose carbon of Barlow for the bound carbon of Abraham, this change not affecting the method of operation. As was said by the Circuit Court of Appeals of the Second Circuit by Judge Noyes in the recent case of the *Ransome Concrete Machinery Co. vs. United Concrete Machinery Co.*, 177 Fed. 413:

"For these reasons we think the use of the Burns apparatus for the purpose of mixing concrete at the utmost only a double use, not involving invention. It is rather a case of changing the materials to be operated upon than of changing the method of operation. Indeed, it seems about as clear a case of double use as is shown in the well-known illustrations given by the Supreme Court in *Potts vs. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 198, 39 L. Ed. 275:

" 'If, for example, a person were to take a coffee mill and patent it as a mill for grinding spices, the double use would be too manifest for serious argument. So, too, this Court has denied invention to one who applied the principles of the ice cream freezer to the preservation of fish. *Brown vs. Piper*, 91 U. S. 37 (23 L. Ed. 200.)'

"See, also, *Mast vs. Stover*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856."

The double use here is adapted the multi-part bound carbon book of Abraham's to the specific use designed by Levison, which *adaptation were involved*

changing the relative size of all the parts of the Abraham leaves so as to make them all equal.

We fail to see in the present case where there is any invention in applying the principle of the bound carbon of the duplicate or manifolding book of Abraham to the *triplicate* book like Barlow, other than the adoption to the mere double use; just as in the Ransome case, it required only mechanical skill. In the Ransome case the Court said in considering the differences between the patent and the prior art:

“We present, then, to a skilled mechanic the problem of increasing the rapidity of the operation of the Burns mixer, so as to mix concrete materials in the face of their tendency to solidify. He knows that old concrete mixers received the materials at one end and discharged at the opposite end. He appreciates the delay caused by adjusting a single chute to both receive and discharge materials. While we recognize the difficulty of drawing a line between mechanical skill and invention, we think that the former should have been sufficient to teach this person skilled in the art to eliminate the double use of the one chute and to duplicate it at the opposite end—to go back to the old method of having separate inlet and outlet.

“Therefore, while we appreciate the usefulness of that which the patentee has accomplished, we are constrained to hold that the difference between the apparatus of the patent in suit and that of the Burns patent do not involve invention, and, consequently, that the former patent is invalid.”

Where the patentee took the combination of an earlier patent, but instead of using the form of link there disclosed substituted another old form of link which had been commonly used for the same or analogous purposes, the character and function of which were well understood in the art, he may have secured better results, but the substitution involved no invention. *North Jersey St. Ry Co. vs. Brill*, 134 F. 580, (3rd Cir.)

The patent in this Brill case came before the Supreme Court in *Brill vs. Washington R. & E. Co.*, 215 U. S.—reported in U. S. Sup. Ct. advanced sheets, p. 177, Oct. term, 1909.

In this case Justice Holmes speaking for the Court said:

“The rule controlling a case like the present is very aptly stated in the recent case of *Warren Webster Co. vs. Dunham Co.*, 181 Fed. 836, (C. C. A.):

“But the application of an old device or combination to a new use is not in itself an invention, or capable of protection by a patent. If the relation between the two uses is remote, and the old device or combination produced a new result by virtue of its new application, that application may constitute invention. Where a machine or a combination is discovered in a remote art, where it is used to perform a different function, and where it was not designed and was not apparently suitable to accomplish the thing desired, the application of it with proper mechanical adaptation to a new use is often the result of the exercise of the inventive faculty and may be protected by pat-

ent. But the thought that an existing machine or combination, discovered in the same art or one nearly analogous to it, designed and suitable to perform a similar function, may be used or adopted to accomplish the desideratum, is not the product of inventive genius, but the result of the application of the skill of the mechanic to the subject under consideration. *It is only when the new use is so recondite and remote from that to which the old device and combination has been applied, or for which it was conceived, that its application would not occur to the mind of the ordinary mechanic skilled in the art, seeking to devise means to perform the desired function, with the old machine or combination before him, that its conception may rise to the dignity of invention.* *Potts vs. Creager*, 155 U. S. 597, 608, 15 Sup. Ct. 194, 39 L. Ed. 275; *Hobbs vs. Beach*, 180 U. S. 383, 390, 21 Sup. Ct. 409, 45 L. Ed. 586; *Adams Electric Ry. Co. vs. Lindell Ry. Co.*, 77 Fed. 432, 447, 23 C. C. A. 223, 237; *National Hollow Brake-Beam Co. vs. Interchangeable Brake-Beam Co.*, 106 Fed. 393, 702, 45 C. C. A. 544, 533.”

On the question of invention the query of the Court in the recent case of *Jacobs Mfg. Co. vs. Almond Mfg. Co.*, 177 Fed. 935, 6 C. C. A., 2nd Circuit, is interesting:

“Is it invention entitling a person to the monopoly of a patent to add teeth and a key with cogs to effect motion to the operating sleeve of a drill-chuck—when such device for imparting motion is well known in many arts, and in this very art had been applied to

move the operating parts of chucks of another type (as in Whiton and Washburn)? We are clearly of the opinion that it is not and do not find the circumstance that the improvement has had large sales persuasive to the contrary. The toothed key is, no doubt, bought because it is more useful and convenient than the fingers or a spanner; but utility alone is not enough to establish invention."

Query: Was it invention for Levison to bind in the Barlow double face, single carbon when *bound* carbons were notoriously old in the art? The answer must be in the negative.

Furthermore the circumstance that Levison's structures may have "had large sales is not persuasive to the contrary."

ANTICIPATION.

Anticipation is so closely allied with lack of invention and patentable novelty in the light of the prior art that the two subjects may in many respects be considered together. We refer to it here principally with respect to the prior art, and the comments of the Court below in considering the prior art and finding that there was no anticipation of the Levison claims here in issue.

Judge Van Fleet says further in his opinion: "It appears from an examination of the prior art that this is not the first time that a device has been invented whereby the carbon paper is *bound* in the book, but it does disclose very clearly to my mind, and without any conflict of a substantial character in the evidence,

that this is the first instance in which a practicable device of this character has been invented; and of course it is well established that a device that is of a practical and successful character cannot be anticipated by one that is not, although it *may include all of the elements that may appear in the successful device.*”

We have failed to find in the Record anything to substantiate the fact that the Levison patent “is the first instance in which a *practicable* device of this character has been invented.”

One thing which is to be remarked upon in regard to the Opinion of the lower Court is the lack of any reference whatsoever to the patent of Barlow, by Judge Van Fleet. It cannot be questioned but what Barlow is a part of the prior art, nor can there be any question as to its being “a practicable device.” That is proven by Exhibit 13, the book of the Schilling Co. and the testimony on behalf of defendant. It is not even denied. Likewise there is nothing but the self-serving statement of the plaintiff’s officer, Harry Levison, and the misleading model *Q*, to prove that the Doughty patent does not represent a practical device. As far as anticipation is concerned, the practicability of the Doughty device is of minor importance if it shows enough so that anyone skilled in the art and using only mechanical skill can translate the bound carbon of Doughty into the bound carbon of Levison.

The commercial success of Doughty has nothing

whatsoever to do with its pertinency in showing anticipation of or lack of invention in Levison.

“The scope of a machine alleged to be an anticipation of a later patented machine is coextensive with the range of adjustment of parts which its construction intelligently provides for.”—*Hillard vs. Remington Typewriter Co.* (C. C. A.) 170 Fed. 73.

As was said in *Universal Winding Co. vs. Willimantic Linen Co.*, 82 Fed. 228, 233, affirmed 92 Fed. 391, speaking of a so-called “paper patent” which was relied on by the defendant as a part of the prior art:

“It is a *paper patent*. If it does not anticipate complainant’s machine, it bears directly, if not decisively, upon the question of infringement. The grant of a patent raises a presumption of operativeness, and of some utility, and, if prior, even though it be a mere paper patent, it may anticipate, provided it sufficiently discloses the principle of the alleged invention. Such prior patent may be relevant also to show that another device is not an infringement of such alleged invention, but is merely an improvement upon the prior patent, of an application thereof to a new purpose. *Pickering vs. McCullough*, 104 U. S. 319; *Dashiell vs. Grosvenor*, 162 U. S. 432, 16 Sup. Ct. 805. In this case the conclusion reached upon all the evidence is that the defendant’s device is such an improvement or adaptation of the art existing at the date of the invention in suit.”

“That the device of a patent never came into commercial use does not prevent such patent from being

an anticipation of a later one, if it sufficiently embodies the elements and discloses the principle of operation of the latter; or from narrowing its scope; nor is it material that the earlier patentee did not claim the particular device of the later patent as a part of his invention.—*E. L. Watrous Mfg. Co. vs. American Hardware Mfg. Co.* (C. C.) 161 Fed. 362.”

Consequently, we see that his Honor’s conclusion, “that a device that is of a practicable and successful character cannot be anticipated by one that is not, although it may include all of the elements that may appear in the successful device”, is not a true expression of the law.

The only two patents which his Honor in the Court below appears to have considered at all are the Doughty and Bengough patents, but if we read his decision rightly it would seem that he has misunderstood or misinterpreted these two patents. Judge Van Fleet says:

“The history of this art shows that, although there had been at least two previous devices patented wherein the *carbon was bound into the book*, neither one of those was a *practicable* device. That is particularly true of the Doughty patent, where there was a device by which the carbon was bound in the middle of the book and by a cumbersome and complicated arrangement the carbon could be used by folding over the sheets first on one side and then on the other; but that was proven and shown very clearly to my mind to be entirely impracticable and was not a *success and has practically gone out of existence*. The other de-

vice, the Bengough patent, is not to my mind in any sense an anticipation of the present one. It was a very cumbersome arrangement, whereby the carbon was attached to the book by a *wire frame*, was not bound into the book in any proper sense at all; it was merely attached to it, and when the book was opened to be prepared for use, by throwing this framework over it would put this carbon in a position where the recording sheets could be folded upon it, and thereby a manifold register made. An inspection of these two devices, that is the Doughty device and the Bengough device, tends to satisfy me as much perhaps as any other thing in the case that the idea of the complainant in creating his device was not obvious; that it was merely one of those happy thoughts which came to him by some sort of inspiration and brought about success out of what had been previously comparative failure; and this, as heretofore indicated, is always potent evidence of invention."

Now of course, if his Honor admits that in the Doughty patent, as he must admit in the light of all the testimony, and the patent itself, that the carbon is *bound* into the book, then of course it is an end to the matter, and the Levison patent is void. With that view we coincide exactly. The part in his Honor's Opinion where he says of Doughty that "the carbon could be used by folding over the sheets first on one side and then on the other," is not understood, unless he has been misled by the plaintiff's bogus model Q.

Furthermore, there has been no evidence to show that even this form of the Doughty device "to be en-

tirely and practical and was not a success and has practically gone out of existence," save for the haphazard statement of plaintiff's witness, Harry Levison who said that he had never seen any of these devices on the market. We introduced the patent to show a manifold triplicate receipt book with a bound double-faced single carbon, and that is all that the Levison patent is when we consider it with respect to claims 3, 4 and 5. The differences between Levison and Doughty at best, are mere changes in form, proportion and degree, not amounting to invention on the part of Levison.

Smith vs. Nicholls, supra.

From his Honor's description of the Bengough patent it is not possible to recognize any exhibit here in the case.

It is quite apparent that Judge Van Fleet was impressed by the evident commercial success of the Levison book, but laid undue stress on that feature since he made this feature of commercial success the basis of his conclusions going even much further in that respect than the Courts have done in other cases.

"The argument made by counsel for appellants in favor of patentability based on the *utility, public acceptance, or magnitude of sales* of the patented article is appropriate in cases of doubtful invention, and sometimes is sufficient to turn the scale; but as we are unable, in view of the *prior art*, to consider the question of invention doubtful, but, on the contrary, hold that the inventive faculty was not exercised by

Voightmann, the argument avails nothing to applicants. *McClain vs. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; *Adams vs. Bellaire Stamping Co.*, 141 U. S. 539, 12 Sup. Ct. 66, 35 L. Ed. 849; *Grant vs. Walter*, 148 U. S. 37, L. Ed. 552; *Duer vs. Corbin Cab. Lock Co.*, 149 U. S. 216, 37 L. Ed. 707; *Union Biscuit Co. vs. Peters*, 125 Fed. 601 (C. C. A.); *Mast, Foos & Co. vs. Stover Mfg. Co.*, supra." *Voightmann vs. Weis & Ridge Cornice Co.*, 148 Fed. 854 (C. C. A.).

"In view of the foregoing, the asserted extensive use into which the device has gone and large amounts in royalties that have been paid to complainant cannot be considered as giving the device patentable novelty. Upon this point, the adjudications uniformly hold that, where there is no invention, the extent of the sales and use of the patented article is immaterial. *McClain vs. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; *Adams vs. Bellaire Stamping Co.*, 141 U. S. 539, 12 Sup. Ct. 66, 35 L. Ed. 849; *Peoria Target Co. vs. Cleveland Target Co.* (C. C.) 47 Fed. 725; *Olin vs. Timken*, 155 U. S. 155, 15 Sup. Ct. 49, 39 L. Ed. 100."

Hotel Security Checking Co. vs. Lorraine Co.,
155 Fed. 298-301.

See also

Crompton vs. Knowles, 7 Fed. 199;

Goodyear Tire etc. Co. vs. Rubber Tire Wheel Co., 116 Fed. 363, 377 C. C. A.;

American Sales Book Co. vs. Bullivant, 117
Fed. 255, C. C. A. 9th Cir.;

Boss Mfg. Co. vs. Thomas, C. C. A., (8th Cir.)
182 Fed. 811, 814.

In the last case it was said:

“The complainant urges upon us the extensive use of the husker of the patent as claimed by him, as evidence of the patentability of that husker. In doubtful cases the fact that a patented article has gone into extensive or general use is evidence of its utility; but that is by no means conclusive of its patentability. When there is no invention, the extent of the use is a matter of no importance. *McClain vs. Ortmyer*, 141 U. S. 419—429, 12 Sup. Ct. 76, 35 L. Ed. 800; *Adams vs. Bellaire Stamping Co.*, 141 U. S. 539—542, 12 Sup. Ct. 66, 35 L. Ed. 849; *Duer vs. Corbin Cabinet Lock Co.*, 149 U. S. 216—223, 224, 13 Sup. Ct. 850, 37 L. Ed. 707.”

These same judges in affirming the decision of the lower Court, adopted the opinion of the trial Judge which was in part as follows and bears both on the question, invention and infringement:

“The late Circuit Judge, William K. Townsend, a most profound patent-law jurist, has well stated at page 396 of ‘Two Centuries Growth of American Law’: ‘Accordingly, it is now settled that the production of improvements reasonably certain to have been adopted in the development of a new branch of industry opened up by invention does not entitle the producer to a monopoly. The Patent Office, however,

has generally issued a patent to any one who produced a device not before known, unless it was considered reasonably clear that such device did not involve invention. Therefore, in finding a remedy for the evils above stated, the courts have held invalid a large percentage of litigated patents. This doctrine of the necessity of patentable invention as well as novelty has changed the whole face of patent litigation. The question is no longer, "Is it new?" alone; but "Is it such as would have occurred to a skilled mechanic without the exercise of inventive genius?" The changes in the law on this subject make the history of patent law in the United States.' Although the foregoing is an excerpt from one of a series of lectures by the faculty of the Yale Law School, and not from an authoritative decision by an appellate court, yet it can be stated to be the practice, and likewise the holdings of courts which do speak with authority.

* * * *

"The husking point of complainant's is adjustable and changeable by reason of slots; defendant's by reason of holes. If complainant has valid patents, such patents not being pioneer, but for a mere convenience or improvement, they must be given validity by the most rigid construction only; and the fact the complainant adjusts the heel to its point, as well as the center, by means of slots, while the defendant does the same thing by means of perforations, or holes, does not make a case of infringement, by reason of supposed equivalents. *Ross vs. Dowden* (8th Circuit) 157 Fed. 681, 85 C. C. A. 449.

“There will be a decree for the defendant.”

But as to the so-called *commercial success* of the Levison, both Mr. Crandall and Mr. Kitchen flatly contradict Mr. Levison as to any such degree of popularity claimed for the Levison book. That with his small plant it seemed improbable for him to have such a trade in the first place. Also that such popularity as he may lay claim to is his specializing on this line, advertising and going after the business aggressively. Mr. Crandall, pages 58-60; Mr. Kitchen, pages 173-4. Complainant's business acumen is well illustrated by his charging the City and County of San Francisco *between 50 and 60 per cent more than he would charge an ordinary customer* for the same kind of book, pages 156-7. Aside from the ethics or patriotism of such action, the fact that Mr. Kitchen was able to underbid Mr. Levison on this city job may offer the main cause for this suit.

We believe it is giving too much importance to the Levison alleged invention to give it a niche in the “happy thought class”; nor does the evidence justify the conclusion that he “brought about success out of what had been previously comparative failure.”

What Levison seems to have done was to have had the temerity to go before the Patent Office and was fortunate (or unfortunate) enough to strike a lax or incompetent official, as we will see from the file wrapper; consequently by the negligence of the Patent Office, he was able to secure a patent to what he had no right to and which was public property.

THE FILE WRAPPER.

In every patent case the file wrapper and contents of the patent involved are capable of shedding more or less light on the degree of favor to be accorded the patent, and in all cases the file wrapper is referred to, to discover any material limitations in the claims, and learn if the actions in the Patent Office have been such as to indicate the oversight of some important reference. The file wrapper of the re-issue patent has been introduced in evidence as defendant's Exhibit 8, page 86.

In the original patent there was but one claim which has hereinbefore been set out. The re-issue application when filed contained three claims. These claims are set out below and the amendments which were made to these claims after the re-issue application was filed, are indicated in italics, while the words which are crossed out in these claims show those words to have been erased by amendment.

ORIGINAL CLAIMS.

Claim 1. A manifold book composed of sections, each section comprising in order a double carbon sheet, a plurality of recording sheets, and a card board backing, the record sheets *outside the stubs* being divided into three *substantially equal* separable parts, the carbon sheets extending the width of two of said parts, and the cardboard backing extending the width of one of said parts, said recording sheets and backings having stubs to which they are attached along

lines of perforations, said stubs and the edge of the *one side of each* carbon sheets being all bound together to form a book, substantially as described.

Claim 2. A manifold book comprising in order a double carbon sheet, a plurality of recording sheets, and a card board backing, the record sheets *outside the stubs* being divided into three *substantially equal* separable parts, and the carbon sheet, extending the width of two of said parts, said recording sheets having stubs to which they are attached along lines of perforations, said stubs and *one side* the edges of the carbon sheet and backing being all bound together to form a book, substantially as described.

Claim 3. A manifold book comprising in order a double carbon sheet, and a plurality of recording sheets, the record sheets *outside the stubs* being divided into three *substantially equal* separable parts, and the carbon sheet extending the width of two of said parts, said recording sheets having stubs to which they are attached along lines of perforations, said stubs and *one side* the edges of the carbon sheet being all bound together to form a book, substantially as described.

The first official action on these claims was on April 4, 1902, when the Examiner rejected claims 2 and 3 on the prior art and objected to all the claims; this official letter of rejection being as follows:

REJECTION.

“April 4, 1902.

“This action is in response to applicant’s communication filed.

“All the claims are inaccurate near the end, since the carbons are not bound at their edges, but *one side of each carbon is bound, &c.*

“In claims 2 and 3 the relative sizes of the parts of the sheets are not defined, and so the size of the carbon is also indefinite except that it is smaller than the record sheet. At present these claims do not distinguish sufficiently from Clark, No. 429,366, June 3, 1890, (Book-Binding: Leaves); Bengough, No. 553,503, Jan. 28, 1896, or Abraham, No. 634,438, Oct. 10, 1899, (Book-Binding: Writing Tablets, Manifold-ing), and are therefore rejected.”

Thereupon, the applicant amended his application and by his attorney filed the following letter of amendment of April 12, 1902:

AMENDMENT OF APRIL 12, 1902.

“For reasons connected with the sale of this invention applicant will esteem it a favor if the Examiner will act upon this amendment at the earliest possible moment, giving the same precedence over other cases as set forth in regard to re-issue applications in the second clause of rule 63 of the Rules of Practice.

“I amend this application as follows:

“Page 2, 6th line from the bottom, after ‘sheet’ insert ‘outside the stub 7’; after ‘three’ insert ‘substantially equal’.

“Page 3, lines 4 and 5 for ‘the edges of the’ substitute ‘one side of each’; line 5 change ‘sheets’ to ‘sheet’; at the end of the 4th line from the bottom of the page insert ‘It has been already stated that the

three separable parts of each recording sheet are substantially equal. They are not exactly equal, since it is preferable to provide the innermost part with an unprinted additional space or margin next the stub through which are punched the holes 9 to facilitate the filing of said part. Moreover it is better to leave a small space between the edge of the sheet when folded and the line of perforations 8, as this renders it easier to fold the parts. With this exception the separable parts of each recording sheet are of the same size, and in general will contain identical printed matter thereon.

“Claim 1, line 4, after ‘sheets’ insert ‘outside the stubs’; after ‘three’ insert ‘substantially equal’; line 9, for ‘the edges of the’ substitute ‘one side of each’; line 10, change ‘sheet’ to ‘sheets’.

“Claim 2, line 3, after ‘sheets’ insert ‘outside the stubs’; line 4, after ‘three’ insert ‘substantially equal’; line 7 for ‘the edges’ substitute ‘one side’.

“Claim 3, line 3, after ‘sheets’ insert ‘outside the stubs’; after ‘three’ insert ‘substantially equal’; line 6 for ‘the edges’ substitute ‘one side’.

“Add the following claims:

“4. A manifold book comprising in order a double carbon sheet, and a plurality of recording sheets, each of said sheets outside the stubs being divided into a plurality, not less than ~~two~~ *three* of substantially equal separable parts, and the carbon sheet extending the width of said parts except the outermost, said recording sheets having stubs to which they are attached along lines of perforations, said stubs and

one side of the carbon sheet being all bound together to form a book, substantially as described.

“5. A manifold book comprising in order a double carbon sheet, and a plurality of recording sheets, each recording sheet outside the stub being divided into a plurality not less than ~~two~~ three of separable parts joined along lines of perforations, each part being not greater than the part next it on the side towards the stub, and the carbon sheet extending the width of the whole of said parts except the outermost, said recording sheet having stubs to which they are attached along lines of perforations, said stubs and one side of the carbon sheet being all bound together to form a book, substantially as described.”

By this amendment two new claims were added which were rejected on the prior art, the letter of rejection of May 6, 1902, being as follows:

REJECTION, MAY 6, 1902.

“This case has been reconsidered as amended April 19, 1902. Claims 1, 2 and 3 are now allowable.

“New claims 4 and 5 are so broad as to be met not only by Clark, Bengough or Abrahams, of record, but by many other patents, as Wende, No. 556,484, March 17, 1896; or Cooke, No. 558,637, April 21, 1896, (Book-Binding: Writing Tablets, Manifolded). These claims are rejected.”

The final amendment of May 26, 1902, which put the case in condition for final allowance, was as follows:

AMENDMENT, MAY 26, 1902.

“I amend this application as follows:

“Claims 4 and 5, line 4, change ‘two’ to ‘three’.

“The word ‘two’ in these claims was an error, and it was intended to write ‘three’ therefor.

“The combination of these sheets with the double carbon sheet appears to be patentable and an allowance is respectfully requested.”

There are several remarkable things in connection with this final allowance:

First: *the Examiner never once referred to the Barlow patent nor the Doughty patent.* Naturally to an efficient, conscientious, and diligent Examiner it will seem that those patents would have been the very first patents that he would have referred to;

Second: and this point is not the less remarkable, the mere change of the word “two” to “three” sufficiently differentiated in the opinion of the Examiner, the re-issue claims 4 and 5 from the patents of Bengough and Abraham; and the defining of the parts of the record sheets as being “substantially equal” satisfied him that claims 2 and 3 were novel.

And in the face of such actions as these amounting to gross carelessness by the Patent Office, and such immaterial changes as were made in the claims to confer patentability upon them, the lower Court found that Levison was practically a pioneer in the art, and that his claims were entitled to a broad and liberal construction. Nothing more unjust to defendant could be conceived and counsel knows of no adjudicated case where on such a showing of the record

in the Patent Office, such a conclusion has ever been arrived at.

It is a well recognized principle of patent law that the presumption of the validity of a patent arising from its issuance is weakened by the fact that certain prior patents, claimed to anticipate, were not cited nor considered by the Examiner.

Westinghouse vs. Toledo etc. Co., 172 Fed. 371, C. C. A. 6th Cir.;

Cleveland Foundry Co. vs. Kauffman, 126 Fed. 658;

American Soda Fountain Co. vs Sample, 130 Fed. 145, 64 C. C. A. 497.

In the last case the court said:

“We do not agree with the contention, that the fact that the file wrapper discloses the patent to have been granted as first applied for, without any references, adds any force to the presumption of novelty arising from the grant. On the contrary, *we think the force of that presumption is much diminished, if not destroyed, by the lack of any reference by the Examiner to, or consideration of, the “Clark” patents.* It does not seem likely that an expert examiner would pass them by without notice or consideration, if they had been called to his attention. We fell compelled, therefore, to the conclusion, that the first and fifth claims of the patent in suit are invalid for want of patentable novelty.”

Nothing could show the application of the doctrine of *Smith vs. Nichols*, 21 Wall 112; 22 L. Ed. 566, more forcibly than the extraordinary action of the Examiner in holding that Levinson could patent a sheet which is divisible into “not less than *three* parts” but could not patent one which was divisible into “not less than *two* parts.” In that case the court held:

“A mere carrying forward, or new or more extended application of the original thought, a change only in form, proportions or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent.”

This opinion has been followed repeatedly in numerous subsequent decisions.

The amendments made by Levison's attorney are strikingly in the direction of *mere degree*. The writing in of the words “three” instead of “two” in claims 4 and 5 by the amendment of May 26, 1902, indicate no change in principle nor any new result. Both principle and result and as far as the claims go the mode of operation remained the same. The change was a *mere enumeration* of a number higher than two: a more striking instance of simple change in degree could scarcely be imagined.

So it was with the amendment of April 12, 1902, when Levison's attorneys distinguished claims 2 and 3 from Bengough and Abraham by defining the sheet as divided into three “substantially equal”

parts. Now “substantially equal” relates merely to *relative size* or *proportion*, and consequently those changes whereby the claims were sought to be differentiated from the references, came directly within the inhibition of *Smith vs. Nichols*.

A quite recent expression of this same idea is found in *American Laundry M. Mfg. Co. vs. Troy Laundry M. Co.*, 171 Fed. 870, 877:

“Taken as a whole, I do not doubt that this Wendell mangle or ironing-machine is as good as any, if not the very best on the market. However, this superiority is not the result of mental conception amounting to patentable invention which found birth with Wendell, or any one man. It is an assemblage and union of different elements from various sources and a combining thereof in an ironing-machine, or mangle, to iron various articles in the old way arriving at the same result, and it may be an improved result; but this it not necessarily patentable invention. Not every improvement is invention. If ordinary mechanical skill is adequate to make the selection and union, or combination, and no new idea is involved in the process, there is no patentable invention, however great the improvement. See *Dodge Coal Storage Co. v. N. Y. C. & H. R. R. Co.*, 150 Fed. 738-741, 80 C. C. A. 404; *Dunbar v. Eastern Elevating Co.*, 81 Fed. 201, 26 C. C. A. 330; *Atlantic Works v. Brady*, 107 U. S. 192, 199, 200, 2 Supt. Ct. 225, 27 L. Ed. 438. In this last-cited case Mr. Justice Bradley, giving the opinion of the court, said:

“ ‘The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle, and injurious in its consequences.’ ”

We are not without precedent in the art of manifold books, where simple adaptations of prior devices to the individual taste of a later use has been held not to amount to invention. A leading case on this line is that of *American Sales Book Co. vs. Carter-Crume Co.*, 150 Fed. 333 C. C. A., 2nd Cir., before Justices Lacombe, Townsend and Coxe. In declaring the Beck patent for a “Manifold Sales Book” void, the Court said:

“In these circumstances, we are brought to the argument that these prior constructions do not negative invention because they were not designed to be used for the purpose stated in the patent in suit. In the consideration of this question we are not unmindful of the rule, as stated by this Court in *Wickelman vs. A. B. Dick Co.*, 88 Fed. 264, 266, 31 C. C. A. 530, 532:

“ ‘That novelty is not negated by a prior accidental production of the same thing, when the opera-

tor does not recognize the means by which the accidental result is accomplished, and no knowledge of them, or of the method of its employment, is derived from it by any one. *Pittsburg Reduction Co. vs. Cowles Electric Smelting & Aluminum Co.* (C. C.) 55 Fed. 307; *Chase vs. Fillebrown* (C. C.) 58 Fed. 377; *Topliff vs. Topliff*, 145 U. S. 161, 12 Sup. Ct. 825, 36 L. Ed. 658; *Tilghman vs. Proctor*, 102 U. S. 707, 711, 26 L. Ed. 279.'

"See, also, *Boyd vs. Cherry*, (C. C.) 50 Fed. 279, 283; *Clough vs. Barker*, 106 U. S. 166, 1 Sup. Ct. 188, 27 L. Ed. 134.

"But, in order to apply this doctrine to the case at bar, we must not only treat the Mooney book as an accidental construction, but we must ignore the evidence that it was used in the manner contemplated in the patent in suit, and must, further, disregard Oldfield's testimony that the object of his notched corner was to permit the removal of both sheets without soiling the fingers, and that substantially the method described in the patent in suit was recommended to purchasers in operating such books. But even if we accept all these assumptions, as contended for by complainants, it appears from an inspection of the books themselves that they are so constructed with carbons having notched corners as to enable any user to withdraw the leaves without soiling the fingers by taking hold of the leaf at the point exposed by the notch. And it seems too clear for argument that if users of these books did not actually 'lift the (carbon) sheet in order to withdraw the leaves from beneath it in

manipulating the pad,' it was not because these books were not manifestly designed or intended to be used in that manner, but because for reasons of their own the users preferred another and simpler form of withdrawal. In each case there was disclosed a construction capable of operation according to the method stated in the patent in suit; the manner of use was either a matter of the individual taste of the user, or the result of the exigencies of the particular use to which the book was to be devoted. In such a case the prior construction is in itself a demonstration that it is within the principle of the patent; it is actually adapted to and capable of the use contemplated by the patent—in the Mooney book without alteration, in the Oldfield book either without alteration or by a mere change in the location of the notch in order to secure the identical operation and result accomplished by the patent in suit.

“As these conclusions have been reached upon a discussion of the opinion of the Court below and of the evidence of complainants’ witnesses, it does not seem necessary to consider the evidence of defendants’ witnesses or the arguments based thereon.

“The decree is reversed, and the cause is remanded to the Court below, with instructions to dismiss the bill, with costs.”

The law of this Circuit for a patent of this character is fully and plainly laid down by your Honors in the recent case of *Lewis Construction Co. vs. Semple, et al.*, decided February 7, 1910, reported in

177 Fed. 407, opinion by Judge Gilbert and concurred in by Judges Morrow and Hunt.

In that case the patent sued on was for an improvement in *pipes* for use in carrying sand, gravel and other material from dredgers, hydraulic or other excavating devices, the pipe having a lining composed of blocks of wood arranged in circular series presenting the grain of the wood endwise at the inner surface of the blocks for a wearing surface, such series of blocks being inclosed in a casing of longitudinal wooden strips, the series of blocks being bound with hoops, and the outer casing wound with wire. Of the claims therein alleged to be infringed the following is a sample:

“A pipe having a lining composed of a series of blocks of wood, presenting the grain of the wood endwise at the inner faces of the blocks, and a casing, substantially as set forth.”

The defendant in that case operated under a subsequent patent, and his dredger pipe was made with a wire wound stave casing with the bottom of the interior of the casing having a wearing surface of wood blocks cut across the grain. In that case just as in the present one, the complainant patentee contended for liberal construction of his claim and that, “the patent is not limited to the exact mechanism described but is entitled to the benefit of the doctrine of equivalents.”

Your Honors upon examination of the prior art found in a prior patent to one Jacob Boyers of 1881, a *pump* with a hard wood lining having the end of

the grain presented to the action of the piston and fluid; and also found in a patent to one J. H. Morton, 1883, for a rectangular pipe, "lined on the sides and bottom with blocks of wood which are sawed out across the grain so that when placed in position the wear will come on the end grain."

Your Honors also found by reference to the file wrappers in that case that the Examiners-in-Chief in the Patent Office in allowing the Semple claims *made no reference to the Martin patent or the Boyer patent...* (Note in the present case where the Patent Office made no reference to the Barlow or Doughty patent while Levison's application was pending.)

Your Honors also found, as set forth in the opinion on page 410, that there was a demand for just such a pipe as the Semple invention and that, "Semple was the first to devise a claim for retaining the blocks in place; for that devise he obtained a patent and we hold that the invention was patentable, but in view of the prior art, etc."

The foregoing runs almost like a paraphrase of the facts in the present case. Levison was the first to permanently *bind* a carbon into the *stubs* of a special *triplicate*, three-part leaf book, and his book has been popular; but it is not the only triplicate book on the market by any means. The Examiners in the Patent Office and his Honor in the Court below have "considered the question of anticipation and patentability only as affected by the Doughty and Abrahams patent." (The Patent Office referring to certain other patents for features not involved

in the present case), “but made no reference to the Barlow patent nor the Doughty patent.”

Levison may have been the first to devise a scheme for building up a book in sections comprising stop cards of certain length, with *bound* carbons interspersed at intervals through the triplicating leaves. As your Honors said in the Semple case: “For that device he obtained his original patent with a single claim and that part of his so-called invention may or may not be patentable.”

But respondent-appellant is not sued for infringement of claim No. 1, nor for any infringement of claim No. 2, but it is sued on claims 3, 4 and 5 of the Re-issue. To paraphrase your Honor’s language; “The prior art shows the notorious use of triplicate books in which the three part leaves are interfolded with a carbon two-thirds the length of the leaves in exactly the same manner for exactly the same purpose as in Levison and particularly as such use is shown in the Barlow and Doughty patents.

“We think that the scope of the Levison patent (if valid) must be limited to the use of such books with a carbon bound in the stubs with a particular means for holding the carbon in place and that he cannot be allowed the broad claim of invention on the idea of a triplicate book with any kind of a ‘held or restrained’ carbon whether ‘bound’ or not. It does not follow that because he was the first to bind the carbon in between the stubs of a *triplicate* book he became entitled to a monopoly of the use of any

kind of a carbon and any kind of carbon holding means in a triplicate book. He had before him the Barlow patent in which the same device of triplicate leaves or single, double-face carbon was used for triplicating purposes. He had before him the Doughty patent in which the same device with a *single bound* double-faced carbon and three-part leaves, was used for triplicating purposes; he had before him the Perry patent in which there was a triplicate book with a single, double-face carbon used for triplicating purposes; he had before him the patents to Abraham and Bengough each, with a carbon *bound* into the stubs and the multiple copies obtained by appropriately inter-folding the carbon and sheets.

“It is true that the Barlow patent relates to exactly the same invention that the Levinson patent relates to, to-wit: a triplicate single, double-faced carbon receipt book. It is true also that the Barlow patent shows a loose carbon; but it is also true that the Abraham book while having a *bound* carbon is perhaps only designed for duplicating use; but the two ‘arts,’ (making for a moment the violent assumption that a *duplicate* book is in one ‘art’ and that a *triplicate* book is in a separate art) are not so remote, that the transfer of the *bound* carbon from one ‘art’ to the other, or the substitution of *triplicate* leaves for *duplicate* leaves would involve invention.

“*Stearns Co. vs. Russell*, 85 Fed. 218, 29 C. C. A. 121; *Standard Castor & Wheel Co. vs. Castor Socket*

Co. 113 Fed. 162, 51 C. C. A. 109; *W. F. Burn Co. vs. Mills*, 143 Fed. 325, 74 C. C. A. 525.

“Levison had before him also the patent to Doughty in which a single *bound* double-faced carbon was held contiguous to the stubs, which *required no handling*, and which carbon was two-thirds the length of the triplicating sheet and the leaves interfolded with this carbon in *precisely the same way as in Levison* and *for the same purpose*. There was no invention in binding the Doughty bound carbon into the boook by *staples or sewing* instead of the means employed by Doughty. It was but a change in form; nor can invention be predicated upon the *use* of such a *bound* carbon by means of staples. If the carbon is to be bound in permanently as contemplated by Levison, then perhaps no other form of binding was possible. If he is to use a *bound* carbon, and still have it be some other kind of a bound carbon from Doughty, it must of necessity be *bound* by *staples* or like permanent *securing* means “substantially as described.” In short, his invention (if any) was a mere improvement or adoption of what had gone before and it does not mark a distinct improvement in the development of the art. The novelty of his patent must rest on the means which he adopted to carry his idea into effect—the Levison invention being combined substantially to the precise construction which the invention describes, it is obvious that the Kitchen invention does not infringe in. Instead of using a *bound* carbon appellant uses a *loose* carbon, as stated by the witnesses and as ad-

mitted by his Honor in the Court below. In the Levison device it is evident that the carbon is held in position by staples or wire passed through the stubs and carbon. In the appellant's book the carbon is not bound into the stubs, but is an *unbound* carbon which can be easily removed or inserted into the book just like in Doughty, and the only means for holding the carbon temporarily in working position is by means of the stiff sheet of cardboard to which the Kitchen carbon is attached and which piece of cardboard is shoved into the stubs and retained in clamp fashion. These marked differences of construction are sufficient to avoid infringement."

That the law, as your Honors expressed it in the Semple case above, is the law of the land, is seen by a vast number of decisions including:

McMillan vs. Water Arch Furnace Co. 177 Fed. 401, C. C. A.

Acetylene Burner Case, 215 U. S., Advanced Sheets N. Y. Sup. Ct., No. 3, Jan. 1, 1910, page 47;

Brill Car Truck Case, 215 U. S. Advanced Sheets, Jan. 1, 1910, No. 3, page 177;

Computing Scale Co. vs. Automatic Scale Co. 204 U. S. 609.

Wright vs. Yuengling, 155 U. S. 47; 39 L. Ed. 64;

Milwaukee Co. vs. Brunswick etc. Co., 126 Fed. 171, C. C. A.

THE PATENT IS VOID AS A REISSUE AS BEING A DEPARTURE FROM THE ORIGINAL; AS NOT FOR THE SAME INVENTION; AND AS CONTAINING NEW MATTER NOT AUTHORIZED BY THE STATUTE.

Reissues are permitted under Section 4916 of the U. S. Revised Statutes:

“Whenever any patent is inoperative or invalid, by reason of a *defective or insufficient specification*, or by reason of the patentee claiming as his own invention or discovery *more* than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the Commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the *same invention* and in accordance with the corrected specification, to be issued to the patentee, or, in the case of his death or of an assignment of the whole or any undivided part of the original patent, then to his executors, administrators, or assigns, for the unexpired part of the term of the original patent. Such surrender shall take effect upon the issue of the amended patent. The Commissioner may, in his discretion, cause several patents to be issued for distinct and separate parts of the thing patented, upon demand of the applicant, and upon payment of the required fee for a re-issue for each of such re-issued letters patent. The specifications and claim in every case shall be subject to revision and restriction in the same manner as original applications are. Every patent so re-issued, together with the corrected speci-

fication, shall have the same effect and operation in law, on the trial of all actions for causes thereafter arising, as if the same had been originally filed in such corrected form; but *no new matter shall be introduced into the specification*, nor in case of a machine patent shall the model or drawings be amended, except each by the other; but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the Commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake, as aforesaid. ((See prior patent statutes: Section 53, 1870; Sections 5 and 8, 1837; Section 13, 1836; Section 3, 1832.)”

The patent is void as a *re-issue*. This phase of the question was more or less lightly passed over by his Honor in the Court below.

The defense of invalidity through re-issue is not based on the lack of due diligence of the patentee in applying for the re-issue, nor on the principle that the re-issue broadened the claims. The defense is based on the more fundamental grounds that the re-issue application was not for the “same invention” as the original, and that it embraced “new matter;” the existence of either one of which conditions is fatal to the validity of the patent under the Statute.

It has already been pointed out how Levison in his re-issue expanded his specification to include the special feature that his sheets are divided into three “substantially equal” parts, and sets up in his re-

issue that this *equal* divisional idea with a *bound* carbon was his real invention; although in his original patent he had clearly set out the built up *piles* of sections and interspersed carbons and card board backings, and confined himself to such and took his patent on that combination.

By reference to the file wrapper from which we have already quoted at length it will be seen that the “equal division” idea is the invention of Levison’s *solicitor* and not the patentee at all; at least Levison did not show such “equal division” idea in either his original or re-issue application and *he never made oath* to the fact that it was (if it was), his invention.

The *whole basis of the re-issue claims is embodied in new matter added by the amendment of April 12th, 1902, filed a month after the re-issue application was filed.* This amendment was presented by Levison’s solicitor, Mr. Wright, and no oath was filed as required by law to show that this matter was a part of the original invention of Levison. It simply illustrates further the indifference, laxity and gross carelessness of the Patent Office Examiner in handling this case.

The case of *Parker & Whipple Co. vs. Yale Lock Co.* 123 U. S. 87; 31 L. Ed. 100, is a leading case on the questions of “new matter” and “same invention,” in reissue patents and the attention of your Honors is respectfully invited to that case:

Mr. Justice Blatchford in speaking for the Court said in part:

“The first statutory provision for the reissue of patents was made by the 3rd Section of the Act of July 3, 1832, Chap. 162, 4. Stat. at L. 559. It provided for the reissue in certain cases “for the same invention.” This provision of the Act of 1832 was superceded by Sec. 13 of the Act of July 4, 1836, Chap. 357, 5, Stat. at L. 122, which provided “that whenever any patent which has heretofore been granted, or which will hereafter be granted, shall be inoperative, or invalid, by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had or shall have, a right to claim as new; if the error has, or shall have, arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner upon the surrender to him of such patent, and the payment of the further duty of fifteen dollars, to cause a new patent to be issued to the said inventor, for the same invention.

“This provision of the Act of 1836 was in turn superceded by Sec. 53 of the Act of July 8, 1870, chap. 230, 16 Stat. at L. 205, which provided, “that whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of

such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specifications, to be issued to the patentee.” This provision of the Act of 1870 was enacted in the same language in section 4916 of the Revised Statutes, and was the provision of law in force when the reissue in the present case was granted.

“It is thus seen that in all the statutes on the subject of reissues, the only authority granted to the commissioner is one to issue a new patent “for the same invention.”

“The provision of the Statute of 1836 has been before this Court in numerous cases. In *Burr vs. Duryee*, 68 U. S. 1 Wall. 531, 577 (17:650, 660), at December term, 1863, this court speaking by Mr. Justice Grier, said: “The surrender of valid patents, and the granting of reissued patents thereon, with expanded or equivocal claims, where the original was clearly neither inoperative nor invalid, and whose specification is neither ‘defective or insufficient’ is a great abuse of the privilege granted by the statute, and productive of great injury to the public. This privilege was not given to the patentee or his assignee in order that the patent may be rendered more elastic or expansive, and therefore more ‘available’ for the suppression of all other inventions.”

He continues after quoting *Seymour vs. Osborne*:

“In what was thus said in *Seymour vs. Osborne* there is no warrant for the view, that *ex vi termini*,

what was suggested or indicated in the original specification, drawings or patent office model is to be considered as a part of the invention intended to have been covered as a part of the original patent, unless the court can see, from a comparison of the two patents, that the invention which the original patent was intended to cover fairly embraced the things thus suggested or indicated in the original specification, drawings, or patent office model, and unless the original specification indicated that those things were embraced in the invention intended to have been secured by the original patent. - - -

“ - - - The case of *McGill vs. Wells*, 89 U.S. 22 Wall. 1 (22:699) at October Term, 1874, arose under the Act of 1836. In that case, this court, speaking by Mr. Justice Clifford, said p. 19 (708): ‘invalid and inoperative patents may be surrendered and reissued for the same invention, but Congress never intended that a patent which was valid and operative should be reissued merely to afford the patentee an opportunity to expand the exclusive privileges which it secures, to enable him to suppress subsequent improvements which do not conflict with the invention described in the surrendered patent. - - -

“In the case of *Giant Powder Co. vs. California Powder Works*, 98 U. S. 126 (25:77) at October Term, 1878, this court, speaking by Mr. Justice Bradley, said p. 137 (81), in reference to the reissued patents in that case: ‘These reissues, being granted in 1872, were subject to the law as it then stood, being the Act of July 8, 1870, the fifty-third section

of which (reproduced in section 4916 of the Revised Statutes) relates to the matter in question. It seems to us impossible to read this section carefully without coming to the conclusion that a reissue can only be granted for the same invention which formed the subject of the original patent of which it is a reissue. - - -

“There is no evidence of any attempt to secure by the original patent the inventions covered by the first eight claims of the reissue, and those inventions must be regarded as having been abandoned or waived, so far as the reissue in question is concerned, subject, however, to the right to have made a new application for a patent to cover them; in other words those eight claims are not for the same invention which was originally patented. - - -

“As the rule is expressed in the recent case of *Mahn vs. Harwood* (supra), a patent ‘cannot be lawfully reissued for the mere purpose of enlarging the claim, unless there has been a clear mistake, inadvertently committed, in the wording of the claim and the application for a reissue is made within a reasonably short period after the original patent was granted.’ But a clear mistake, inadvertently committed in the wording of the claim is necessary, without reference to the length of time. *In the present case, there was no mistake in the wording of the claim of the original patent. The description warranted no other claim. It did not warrant any claim covering bands not short or sectional. The description had to be changed in the reissue, to warrant the*

new claims in the reissue. The description in the reissue is not a more clear and satisfactory statement of what is described in the original patent, but it a description of a different thing, so ingeniously worded as to cover collars with continuous long bands and which have no short or sectional bands.” (See also *Ives vs. Sargent*, 119 U. S. 652, 662, 663 (3-:554, 548).

So, with Levison’s original patent “*there was no mistake in the wording of the original patent. The description warranted no other claim. The description had to be changed in the reissue, to warrant the new claims in the reissue.* The description in the reissue is not a more clear and satisfactory statement of what is described in the original patent, but is a description of a different thing, so ingeniously worded as to cover a single sheet divided into three *substantially equal* part with a bound carbon.”

As well stated by Judge Coxe in *Carpenter Straw Sewing Machine Co. vs. Searle*, 52 Fed. 809, 814, and approved by the Court of Appeals in 60 Fed. 82, 8 C. C. A. 476, viz:

“ ‘That unless the Court can find that the invention of the re-issue is described as the invention in the original, and that the patentee intended to secure it as his invention in the original, the re-issue is invalid. It is not for the same invention.’ ”

Marvel Buckle Co. vs. Alma Mfg. Co. 180 Fed. 1002.

“If the fact be that much they have done is open to criticism in a forum of morals, this case in that,

as in other respects, much resembles *Parker & Whipple Co. vs. Yale Clock Co.*, 123 U. S. 87, 8 Sup. Ct. 38, 31 L. Ed. 100. There, as here, the drawings of the original patent showed the feature upon which were based the new claims first appearing in the re-issued patent. There the infringer was the very corporation which had been employed by the owner of the original patent to manufacture the patented clocks. No alleged infringer could well have put itself in a position less likely to appeal to the sympathies of the court. It was, however, held:

“ ‘That what was suggested or indicated in the original specifications, drawing, or Patent Office model is not to be considered as a part of the invention intended to have been covered by the original patent unless it can be seen from a comparison of the two patents that the invention which the original patent was intended to cover embraced the things thus suggested or indicated in the original specifications, drawings, or Patent Office model, and unless the original specifications indicated that those things were embraced in the invention intended to have been secured by the original patent.’ ”

“That case is decisive of this. The subsequent case of *Topliff vs. Topliff*, 145 U. S. 170, 12 Sup. Ct. 825, 36 L. Ed. 658, quite as distinctly declares that a re-issue must be for the same invention as the original patent, as such invention appears from the specifications and claims of such original.

“In this case each of the three claims in suit contain an element which from the specifications and

claims of the original patent cannot be said to have formed a part of the invention there described and claimed.”

Under the doctrine of the recent case of *Gen'l Electric Co. vs. Richmond Street & I. Ry. Co.*, 178 Fed. 84-88, C. C. A. 7th Cir., the Levison patent is void as a re-issue because neither the two conditions precedent existed whereby the Commissioner of Patents was authorized to grant the reissue. As there said, after quoting Sec. 4916 U. S. Revised Statutes:

“Either the original specification must be defective or insufficient, or the original claims must embrace more than the patentee had a right to claim as new. But neither condition is available unless the error arose from inadvertence, accident, or mistake, and without any fraudulent or deceptive intention.

“Findings by the Commissioner that a legal condition exists and is available are conclusive in so far as they depend upon credibility and weight of evidence; but, in so far as they depend upon the legal interpretation and effect of admittedly genuine documents or other undisputed evidence, they are reviewable in court.”

As was said by the Court in that case:

“The original does not suggest that any other action would be possible than that the are would first be driven against the back wall. That such would be the action was a fact known to those skilled in the art prior to the time of the original application. So we find that the original specifications

neither contained erroneous statements of fact nor failed to give a description in such full and clear terms as would enable any person skilled in the art to construct and use the device.”

Like in that case Levison by his' reissue (and through his attorney subsequent to the filing of the reissue application and without filing a supplemental oath) revamped his specifications so as to bring out the idea that his real invention was not the building up in successive series in one book of interspersed stop-cards, leaves and carbons after the manner of his original claim one, but the use of “leaves divided into *three substantially equal* parts on lines of perforations with a carbon to extend over two sections,” entirely omitting the upbuilding of the book in sections with a separate carbon and a separate stop card for each section.

The “new matter” which Levison's solicitor added bodily by amendment and which does not appear in the original, is the following paragraph, lines 84-98:

“It has been carefully stated that the three separable parts of each recording sheet are substantially equal. They are not exactly equal, since it is preferable to provide the innermost part with an unprinted additional space or margin next the stub through which are punched the holes 9 to facilitate the filing of said part. Moreover, it is better to leave a small space between the edge of the sheet when folded and the line of perforations 8, as this renders it easier to fold the parts. With this exception the separable

parts of each recording-sheet are of the same size and in general will contain identical printed matter thereon.”

Certain other changes were made in the specifications at the same time by the solicitor. Notably the insertion of the words “substantially equal,” in lines 41-43, column 1 of the patent.

In the lexicography of the original specification (and also in the re-issue as signed by the applicant and *filed*) there is nothing to define that the proportional divisions of the record sheets should be *equal*.

A *supplemental oath* is essential to support any such amendments as were put in by Levison’s solicitor. See *American Lava Co. vs. Steward*, 155 Fed. 737, where the Court said:

“The changes made in the application were manifestly to develop the newly conceived theory of the mode of operation and to add claims for the process. If this was to be accomplished and the theory were to be embodied in practical means, the specifications should have been made to distinctly point out such means, as we have already pointed out. But in that regard the former specifications were retained. If the application as amended were to be construed as embodying such an invention as is now claimed, it was another and different invention from that for which the patent was originally sought, and, *if an amendment having that consequence was permissible it should have been verified by the oath of the inventor. Railway Co. vs. Sayles*, 97 U. S. 554, 24 L. Ed. 1053; *Eagleton Mfg. vs. West, etc. Mfg. Co.*,

111 U. S. 490, 4 Sup. Ct. 593, 28 L. Ed. 493; *Kennedy vs. Hazelton*, 128 U. S. 667, 9 Sup. Ct. 202, 32; L. Ed. 576; *Michigan Central R. Co. vs. Consolidated Car Heat Co.*, 67 Fed. 121, 31 U. S. App. Ct. 462, 14 C. C. A. 332; *Cleveland Foundry Co. vs. Detroit Vapor Stove Co.*, 131 Fed. 853, 68, C. C. A. 233, the last two cases being decided by this Court. The case of *Eagleton Mfg. Co. vs. West, etc. Mfg. Co.*, supra, was strikingly like the case at bar in all the material facts which were made the basis of decision. Eagleton, the patentee, died soon after making his application. It was prosecuted by his administrators by their attorneys. The amendment was made by them, *but was not sworn to.*”

The latest expression of the Supreme Court condemning the practice of solicitors boldly taking to themselves the right to change and add to specifications at will without the formality of a new or supplemental oath by the inventor is found in the *Acetylene Burner Case*, report in *Advanced Sheets* of the U. S. Sup. Ct. No. 3, Jan. 1, 1910, 215 U. S., opinion of Mr. Justice Holmes:

“It appears to us plain that Dolan’s attorney introduced not merely the theory, but the mode of applying it, for the first time, in the amended specifications; or, in other words, then for the first time pointed to an invention, the essence of which was to have so short a chamber or cylinder as to prevent the mixing of the air taken into it, and to emit the current of gas surrounded by the greater part of such air as an envelop or film. Of course, Dolan desired to

produce the result which the patented article is said to produce, but, beyond that desire, his specification did not give a hint of the means by which it now is said to be achieved. It spoke, it is true, as we have said, of producing a hollow-shaped funnel flame by reason of the gas being forced through contracted openings at very great pressure. But this did not disclose the invention, and was dropped in the amendment. He made no claim for a process and disclosed no invention of a device. *This being so, the amendment required an oath that Dolan might have found it difficult to take, and for want of it the patent is void.* Rev. Stat. Sec. 4892, U. S. Comp. Stat. 1901, p. 3384; *Chicago & N. W. R. Co. vs. Sayles*, 97 U. S. 554, 24 L. ed. 1053; *Eagleton Mfg. Co. vs. West B. & C. Mfg. Co.*, 111 U. S. 490, 28 L. Ed. 493, 4 Sup. Ct. Rep. 593; *Kennedy vs. Hazelton*, 128 U. S. 667, 32 L. ed. 576, 9 Sup. Ct. Rep. 202; *De La Vergne Refrigerating Mach. Co. vs. Featherstone*, 147 U. S. 209, 229, 37 L. ed. 138, 145, 13 Sup. Ct. Rep. 283.” (The italics are ours.)

This phase of the case may well conclude with the following extract from the recent case of *Morse Chain Co. vs. Link Belt Co.*, 182 Fed. 825:

“Morse’s papers upon reissue on their face show ground enough for the commissioner to hold that he had originally conceived his invention in broader terms than merely as a two-part pintle. The issue before the commissioner was what was, in fact, Morse’s actual intention when the papers were drawn, and upon the record there was some evidence

that his intention included a three-part pintle. Upon that issue the commissioner's decision became final and conclusive, and it is not now open to review by me. *Seymour vs. Osborne*, 11 Wall. 516, 20 L. Ed. 33; *Russell vs. Dodge*, 93 U. S. 460, 23 L. Ed. 973; *Topliff vs. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658. Therefore I shall assume that Morse's first patent failed to set forth adequately the original invention as he conceived it, and that this mistake arose from such inadvertence, accident, or mistake in reducing his intention to writing as a court of equity will relieve. *Miller vs. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783. This would be enough to justify the re-issue, provided that the invention actually described in the original patent was the same as that described in the reissue, but not otherwise. *Corbin Cabinet Lock Co. vs. Eagle Lock Co.*, 150 U. S. 38, 14 Sup. Ct. 28, 37 L. Ed. 989; *Durham vs. Denison Mfg. Co.*, 154 U. S. 103, 14 Sup. Ct. 986, 38 L. Ed. 924. The suit in the Seventh Circuit conclusively determined that the original patent did not describe an invention which included the defendant's structure. If, in fact, it did adequately describe some invention, there seems no escape from the conclusion that the invention which it did describe was not the same as the invention which Morse had in mind. No one can seriously urge that the original patent did not in fact completely describe a two-part pintle. That was the invention shown in the original patent, and that, it has been held, was not the invention which the defendant is using.

“The only possible question, therefore, is whether there is enough indication in the patent itself to show that Morse was trying, though unsuccessfully, to express the idea of a pintle of more than two parts. If so, then the invention thus partially and imperfectly described became fully described in the reissue and there was no departure. However, unless that idea is to be found somewhere in the original patent, I cannot say that the reissue, which is clearly broader, is for the same invention as the original. Now, the fact is that the original patent was singularly express in its limitation to pintles of two parts. At the very outset the patentee so characterizes his invention, when he says:

“‘This invention relates to an improvement in driving chains for general power transmission and particularly to chains of this class, wherein the pintle consists of two parts bearing upon one another throughout their length.’

“There is throughout the specification no indefiniteness of expression, but the pintle is referred to uniformly as a two-part pintle just as it is shown in the drawing. * * * It is true that, when the original claims are too broad, a reissue is good which narrows them. *Edison vs. Mutoscope Co.*, 151 Fed. 767, 81 C. C. A. 391. Strictly and literally speaking, that, of course also changes the invention so that it is not ‘the same,’ but there is a great practical difference between that and the precise inverse which was the effort here, because the narrowing of claims does not result in including any structures or processes

which the original claims left open. That result is the reason for the greater jealousy with which the law has always looked at broadened claims, even though there be no ground in logic for the distinction. If the claims may be broadened without any suggestion of it in the original, the only limit to the expansion which the claims may take is that they must not include elements not originally disclosed. By omitting as many of the disclosed elements as the inventor pleases, he may extend the scope of his patent, solely at the discretion of the commissioner, which certainly the statute never intended. I have found no cases in which the basis of such broadened claims was not found in the original patent itself, showing at least in some inadequate and fragmentary way that the invention there disclosed was that claimed in the reissue. *I do not believe that it is enough that the original be related to the reissue as species to genus, whatever may be law for the inverse relation.* Since here, as I have shown, the original had not the faintest suggestion of anything but a two-part pintle, I am very sorry to feel obliged to find the reissue void."

Moreover if Levison claims that the book covered by claims 3, 4, and 5 is not the book of original claim 1, then he is attempting to claim two *genera* in one patent, one of which was wholly absent from his original case and therefore his patent must fall. On the other hand he can not contend successfully that claims 3, 4, 5, are for a *species*, the *genus* of which is represented by the original claim one, because that would be manifestly untrue. This distinction of *genus* and *species*

shows more clearly than anything else the fatal departure in the reissue from the original patent.

INFRINGEMENT.

The present case presents none of the usual earmarks of wanton and deliberate infringement. Defendant sought the advice of his patent counsel before manufacturing his book or applying for a patent on it. He took more than the usual precautions to determine if his book was any infringement, not only on Levison but on any other patent before he began its use. As Judge Platt recently said in a somewhat similar case, one involving a patent on an account book and ledger:

Time-Saver Co. vs. Stamford Trust Co.;

Same vs. Pequonnock Nat. Bank, 165 Fed. 348;

The Court said:

“If the right of the patentee were as clear as counsel for the complainant claims them to be, if the defeat of the patent were a matter of serious doubt, it would have been better for the real defendants to pay tribute to the owner of the patent. In the case at bar, however, they have apparently undertaken to maintain what they conceived to be their manifest right. I cannot believe that they are wanton and malignant trespassers. To my mind, the gist of the case lies in the fact that the Patent Office ought not to have granted Rand his patent, in view of the disclosure contained in the Wever & Parmenter specifications. That grant loses its *prima facie* force, because, upon

careful scrutiny, the oversight on the part of the examiner who had the matter in charge is so obvious. I am of the positive opinion that the disclosure anticipates fully the principle which, it is insistently claimed, furnishes the novelty to Rand's claims of invention, and I cannot blame intelligent gentlemen for taking advantage of so plain a situation. * * * *

"These observations have been made with a running pen, and much more might be said, but the conclusion of the whole matter is that when Rand went to the Patent Office with his application, he took nothing there which was new, and but for the carelessness of a minor official, he would have come away empty-handed."

In affirming this case the upper Court said, *Time-Saver vs. Stamford Trust Co.*, 176 Fed. 358:

"It is unquestionable that account books with creased leaves were old. It is also certain that account columns with appropriate headings—and even marginal balance columns—had been used or described before the time of this patent. Indeed all the complainant contends for as novel is the combination with the other elements of the vertical crease in the middle of the pages."

Every device which is used to produce the same effect is not the equivalent for another:

Burr vs. Duryee, 68 U. S. 531; 17 L. Ed. 750.

For illustrations of equivalents and non-equivalents, see 107 Fed. 498.

"An infringer is not an outlaw. If convinced that the patent is invalid or that he is not infringing he

can go on and use the machine said to be covered by the claims subject to the risk of an injunction and an accounting", *Diamond Stone Saving Co. vs. Brown*, 166 Fed. 306, C. C. A.

As was said in the recent case of *General Electric Co. vs. Allis Chalmers* by Judge Lanning, speaking for the Circuit Court of Appeals for the 3rd Circuit, 178 Fed. 273, 275:

"While the complainant's patent is not limited to the particular device shown in its drawings, but purports to cover also 'other modifications or equivalent means for carrying out' the inventor's idea, the differences of construction and operation above mentioned are fundamental. The general language of the fourth element of the claim sued on, when read with the specification of the patent, as it must be, cannot be so broadly construed as to cover the defendant's device. *The mere fact that the defendant's device may be within the letter of the claim sued on is not conclusive proof of infringement.* This is shown in the opinion of Judge Cross in the Court below (171 Fed. 666). We concur in the conclusion expressed by him in that opinion."

Where the margin of invention is very narrow, the doctrine of equivalents cannot be invoked to make out infringement. *Doze vs. Smith*, 69 Fed. 1002; 16 C. C. A. 581.

That in case of a narrow improvement an attempt to invoke the doctrine of equivalents to make out infringement may result in defeating the claim of the

patent. *Hobbs vs. Gooding*, 111 Fed. 403; 49 C. C. A. 414.

We maintain that even if Levison's patent is valid, it must be so narrowly construed that under no view of the case can the defendant be held to the charge of infringement. The crux of this conclusion is the word "bound" as used in the claims and specifications of the Levison patent, and its meaning in the book-binding art.

In one case Levison says that the bound carbon is one that is "held or restrained" by any means whatsoever; and in another case he admits that Doughty is a bound carbon. P. 251-254.

Levison cannot claim that the term a "bound carbon" in his claims is the equivalent of a loose or "unbound" carbon, as otherwise the claim is immediately met by Barlow. Then again, if he wishes to take the middle course and claim any sort of a held or restrained carbon he is surely met in Doughty. Therefore, we see that he is absolutely committed to the proposition of a bound carbon, as the same is defined by all the defendant's witnesses, and as it is recognized in the book binding art.

And yet in order that Doughty may not anticipate absolutely the claim of Levison, plaintiff's attorney ingeniously argues that although Doughty is in truth a double-faced single carbon combined with a three-part record sheet and so "restrained" that it cannot fall out of the book, and that the defendant uses a single double-faced carbon and a three-part record sheet and that defendant's carbon is also "re-

strained" so it cannot fall out of the book, yet there can be infringement by defendant, but not anticipation by Doughty. For sooth, the plaintiff would blow both hot and cold. However, since words are used advisedly in a claim, and due importance must be given to their real meaning, the evidence and the dictionary leave no question as to what is meant by the word "bound" in the book binding art.

Turning to the testimony it is found that Mr. Crandall, a man of 20 years experience in the book binding art and having no interest in this suit one way or the other, and to whose testimony we have referred before, says in answer to Q. 28, p. 61:

"A bound book I should say that the sheets in the book must be bound *through*."

Again on page 62, he identifies the defendant's book, complainant's Exhibit A, as a "loose leaf carbon book."

"I would not call that carbon bound in the book. It looks to me as a loose leaf carbon, simply a separate piece of carbon."

Q. 30 he was asked:

"In a contract to supply manifolding books, if that contract called for a bound book with carbon bound in, what would you from your experience in your line of business understand by that?"

"I would consider the carbon to be sewed in with the other sheets, the same as the other sheets are."

Again on page 64 he distinguishes between "binding" and mere "holding", as follows in referring to the defendant's carbon:

“Well no, not bound in, not stitched in. It is simply held underneath there. The pressure of the book holds it in place.”

Again page 77:

“RDQ. 4. Is that distinction in bound and loose carbons recognized in the trade?”

“Ans. It is.”

Mr. Maynard, the defendant's expert in answer to XQ. 39, page 135:

“What is your definition of the word, ‘bound’?”

“Ans. The word ‘bound’ in my mind means that the things bound as so held together that they could not be separated from one another without *severing* the binding means.”

Mr. Maynard also points out, page 150, and also in answer to XQ. 106, page 147, that the general state of the art shows that there are two classes of books “the bound book and the loose carbon book”; Barlow, Perry and the defendant being in the class of “loose” carbon books; and Abraham, Bengough and Doughty in the class of “bound” carbon manifold books.

Mr. Kitchen, a practical printer and book binder, defines a “bound” carbon, as follows, pages 163-4:

“A. A bound carbon is a carbon *wired* or *sewed* into the book whereby it cannot be removed without being torn out or destroying the elements of the binding.

“Q. 62. Are there any distinctions made in the bookbinding business between bound carbons and loose carbons?

“A. In the bookbinding art there are two kinds of books, known as a bound book and a loose leaf book.

“Q. 63. What class does your exhibit ‘A’, belong to? A. The loose leaf.”

This idea of “binding” being synonymous with “sewing”, “stitching” and “permanent holding means which must be severed” in order to liberate the parts, is sustained by the lexicographers.

Webster’s International Dictionary defines the verb to “bind” in the printing art:

Bind: “To *sew* or fasten together, and inclose in a cover; as to *bind* a book.”

Binding: “The cover of a book, or the cover with the *sewing*, etc.”

The Century Dictionary and Encyclopedia has the following pertinent definitions:

Binding: “The cover of a book with the *sewing* and accompanying work.”

Book binding: “The process of *sewing* the sheets of a book within a *permanent* casing of book binders board and leather or cloth, or other suitable materials, covering the sides and back, and joint at their juncture.”

“One of the definitions given by Worcester of ‘book’ is ‘a collection of paper leaves *sewed* or *bound*, used for any kind of writing.’”

Tuberville vs. State, 56 Miss. 93, 798.

“A ‘book’ in its popular sense is understood to be a volume, *bound* or *unbound*, written or printed”; *Scoville vs. Toland*, 21 Fed. Cas. 863, 864.

So we see that a clear distinction is made between *bound* and *unbound* volumes.

A “bound” volume is generally spoken of and recognized in all the authorities as a *sewed* volume. Showing a clear distinction between *bound* or *sewed* or *fastened* sheets, and sheets which are *unbound* or *loose*.

The stitching or wiring of Levison is passed through his stubs and *through* his carbon. His carbon cannot be removed without tearing it off and physically dismembering it from the rest of his book. That is what he means by *binding*, or by a *bound* carbon. Such is not the case with Kitchen.

With this distinction between bound and unbound or loose carbons, it seems absolutely conclusive that the defendant under any view of the case, does not infringe.

As to the self-serving “held, restrained” definition of “bound” in the book binding art invented by Levison we might well cite the parallel Thermos Bottle case decided by the Circuit Court of appeals, 2nd Circuit, reported in 178 Fed. 552, where Judge Lacombe said in considering a claim embodying the phrase, “held permanently in position by friction only”:

“The Circuit Court found that in defendant’s structure the supporting blocks are cemented to the outer vertical wall of the inner vessel. The record supports that finding. The blocks are cemented to the outside of the inner vessel, which is thereafter inserted in place, and the adhesion resulting from

this method of applying either alone holds them in place or substantially contributes so to hold them. The theory was advanced in the Court below that when a label is cemented to the outside of a glass bottle it remains in position solely by friction. The expert who so testified admitted on cross-examination that:

“ ‘If the force applied tending to remove the (label) is one parallel to the surface of the bottle (as it would be when the bottle is standing upright), that force will be opposed by friction only. If the force applied tends to remove the label perpendicularly from the bottle (as it would if the bottle were held horizontally with the label down), friction will play no part.’ ”

“Of this the Circuit Court said:

“ ‘This theory may be scientifically correct; but it involves too strained an interpretation of the words ‘frictional contact’ to be adopted in construing the claims. In language in common use, an article cemented to a wall is held in place by the cement, and not by friction.’ ”

“Appellant’s counsel devotes several pages to a criticism of this statement contending that the only ‘language in common use’ which is to be referred to in construing patents is the language in use among persons skilled in the art, and, if the art involves the application of principles of science, the language in use among physicists, ‘should’ he says, ‘the misunderstanding of the man in the street be substituted for the understanding of the person skilled in the art?’

The facts of physical science, even the simplest, may seem 'strained' to people unaccustomed to them.' And he contends that therefore the phrase 'supported wholly by frictional contact' should be construed as his expert defines it. The difficulty with this argument is that we do not know that this definition is part of the language in use among persons skilled in the art and physicists. A physicist from a distinguished university says that it is; but another physicist from another distinguished university says that it is not—that in the case of the bottle and the label it would be 'misleading to describe the effect of cement as increasing friction and as acting by virtue of friction.' When this is all the enlightenment afforded as to the language in common use among 'physicists' and 'persons skilled in the art,' there seems nothing left for a court to do but exercise common sense, even though it be of the commonest kind. So far as anything in this record discloses, we should suppose that a skilled maker of bottles of this sort, who wished to conform his product strictly to the device of the patent, and would be very careful to avoid the use of cement between the blocks and either wall, lest thereby he might produce an adhesion between the two which operate to retain the blocks in place not wholly by frictional contact."

Only the "commonest kind of common sense" is necessary to see that the respondent's carbon is not "bound:" Kitchen's case of "frictional retention" of his carbon is similar to that of the patentee in the Thermos Bottle suit, whilst Levison's "bound" car-

bon is analogous to the *cement* bottle of the defendant in the Thermos Bottle case. In each case the conclusion must be the same.

As to the way words are to be interpreted when used in a claim see *American Steel & Wire Co. vs. Denning Wire & F. Co.*, 176 Fed. 564;

“In *Fay vs. Cordesman*, 109 U. S. 408-420, 3 Sup. Ct. 236, 244 (27 L. Ed. 979), it is said:

“ ‘The claims of the patents sued on in this case are claims for combinations. In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim and his privilege to restrict it. If it be a claim to a combination, and he be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality.’

“But it is urged with apparent sincerity, and some of complainant’s experts say, that the hoppers are the mechanical equivalent of the mechanism of the Bates patent ‘for cutting off suitable lengths of stay wires to span the space between the strand wires.’ The word ‘cut’ is doubtless used in different senses, but its meaning in a given association with other words must be determined from its connection and

association with such other words. A common, and perhaps its most usual, significance is: 'To make an incision with a sharp instrument; to cut or sever by the application of a sharp knife or edged instrument of some kind.' Century Dictionary. To interpret it as it is used in the Bates patent, as synonymous with *separate*, *divide*, *set apart*, or *segregate* would obviously not be the sense in which it is used in that patent. The specifications and drawings of the patent, as well as a model of the machine prepared by the complainant, show beyond any doubt that the stay wire sections are to be cut from spools of continuous stay wire by knives or cutter blades passing each other in close relation, substantially as the blades of shears pass each other, and the word 'cut,' as used in the patent, is undoubtedly intended to convey that meaning. The conclusion is therefore unavoidable that the cutting mechanism of the Bates machine is wholly omitted from defendant's machine No. 5, and that it contains no substitute therefor which is its mechanical equivalent."

His Honor, Judge Van Fleet, in pointing out what he considered would be an equivalent to *binding* by staples, said:

"Of course the claim uses the term 'bound in,' but the patentee does not undertake to confine himself to the manner in which it shall be bound; it simply provides for the binding of the carbon in the book. Supposing that defendant had had his carbons arranged with this *patent paste* or *mucilage* attachment such as we often see, where you can dampen

or wet it with a sponge and attach it to anything; you could take any book in the world that I have ever seen and if that carbon was so arranged you could lift those leaves and stick or paste it at the inner edge and it would be as perfectly bound in that book as any leaf of the book. The fact is you often see such insertions of illustrations in books; they are not bound or sewed in with the leaves of the book, but they are inserted through the book in their proper places by the use of paste or mucilage or other adhesive material, and they are bound in the book just as effectually as though they were sewed in; and so here it seems to me that it is the purest evasion and attempt to get around the device of the complainant by adopting a means of securing *precisely the same end* by what to my mind must be held as in all material respects an equivalent method; and that cannot be allowed." (The italics are ours.)

But the thing is the defendant does not use "paste" or "mucilage," for if he did he would have means which would have to be "severed," as said by Mr. Maynard, or rendered asunder, which is the very essence of "binding." His Honor by attempting to find a substitute for "bound in," as described by Levison, strongly illustrates our point.

Also apparently his Honor considered only the *result* and not the *means* for attaining the result. In finding equivalency and infringement there must be "substantial identity of means," *Walker*, Sec. 158. There are two

factors in equivalency and Judge Van Fleet considered but one necessary.

Even though it is assumed that the stubs of Kitchen frictionally engage the carbon to hold it temporarily in place, and thereby performs the same function of the stitching or *binding* of Levison, nevertheless the function is not performed in the *same way*. As was said recently by the Circuit Court of Appeals for the 8th Circuit in *Johnson Furnace Co. vs. Western Furnace Co.*, 178 Fed. 819, 825, discussing a bill:

“Complainant’s and defendants’ grates each perform the same functions. While it is necessary to constitute infringement that each should perform the same function, performance of the same function does not alone constitute infringement. *Eames vs. Godfrey*, 1 Wall. 78, 17 L. Ed. 547; *Burr vs. Duryee*, 1 Wall. 531-573, 17 L. Ed. 650; *Westinghouse vs. Boyden Power Brake Co.*, supra, 170 U. S. 568-569, 18 Sup. Ct. 707, 42 L. Ed. 1136.”

To constitute infringement, defendants’ binding means must be the mechanical equivalent of complainant’s; in other words, “it must perform the same function in substantially the same way.” *Walker on Patents*, section 358.

His Honor, Judge Van Fleet, in according Levison a broad application of the doctrine of equivalents appears to have been guided to that conclusion by the mere fact that the defendant produced the same result as complainant, and to have left out of consideration the second factor in the definition of a mechani-

cal equivalent, that is, “the substantial identity of means.”

Here in the present case, the *result* of the binding by Levison is not the production of three carbon copies at once writing; it is merely the retention of the carbon in the book. The *result* in Levison is the permanent retention of the carbon in the book in such manner that it cannot be removed therefrom without partial destruction of the book: That is, the physical tearing out of the carbon so that it cannot be re-placed. In Kitchen that *result* is only imperfectly attained. Hence we have not such identity of result even as required by law.

One thing may accordingly be an equivalent of another, *though it does more than that other*, but it cannot be such an equivalent if it does less. (*Id.*; *Bliss vs. Haight*, 3 *Fisher*, 626; *Engle & C. Co. vs. City of Elwood*, 73 F. R. 486.)

As to the second factor, to-wit: The manner of achieving that result, is entirely different in the two cases.

The result is not achieved in “substantially the same way” by the two patentees, for it is to be born in mind that the defendant is operating under a patent on his carbon holding means. In Levison the result is achieved by *stitching* or *permanent non-severable* means passed through the stubs and carbons. In other words, the result is effected by *binding*; whilst on the other hand in Kitchen the *imperfect result of Levison* is only *partially achieved* by an *entirely different mode of operation*. That is, by the

temporary insertion of the cardboard strip 9 of the patent in between the stubs. So basing the question of infringement on the definition of what constitutes a mechanical equivalent in patent law, the defendant cannot be held liable.

The use by defendant of an “unbound” carbon, and the limitation of the Levison claims to a “bound” carbon, is analogous to the *omission of an element* from the patented combination.

Defendant’s book differs as much from Levison as though he had entirely omitted a physical element of the Levison claim, which indeed, in effect and contemplation of law he has done. As was said by Judge Severens speaking for the Circuit Court of Appeals in *Duner C. vs. Grand Rapids R. Co.*, 171 Fed. 863, 5:

“The patentee nowhere suggests that the partition, 29, between the main and side pockets, shall or may extend all the way between the pockets. He expressly says it shall not, but that an opening shall be left through which the sand may pass through from one to the other. We have therefore no right to assume an entire partition. That a claim which is construed by bringing into it, by reference to the specifications, a feature there found, must be regarded as equivalent to a claim having in itself such feature seems to be a logical deduction, and is in accord with the observation of Mr. Justice Blatchford in *Fay vs. Cordesman*, 109 U. S., at pages 420, 421, 3 Sup. Ct. 236, at page 244, 27 L. Ed. 979, where he said:

“ ‘The claims of the patents sued on in this case are claims for combinations. In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. He expressly says the carbon shall be “bound” and he shows it in the drawings as bound by staples or wire stitching and claims it as “bound” “substantially as described.” We cannot therefor say “binding” is immaterial.

As was said in *Acme Truck & Tool Co. vs. Meredith*, C. C. A. 183 Fed. 124, 127:

“In patents for a combination it is well settled that if any essential element of the combination is omitted from an alleged infringing device without substituting therefor its *clear mechanical equivalent*, the charge of infringement is not sustained. *Fay vs. Cordesman*, 109 U. S. 408, 3 Sup. Ct. 236, 27 L. Ed. 979; *Boyd vs. Janesville Tool Co.*, 158 U. S. 260-267, 15 Sup. Ct. 837, 39 L. Ed. 973; *Cimiotti Unhairing Co. vs. American Fur Refining Co.*, 198 U. S. 399-410, 25 Sup. Ct. 697, 49 L. Ed. 1100; *Eames vs. Godfrey*, 1 Wall. 78, 79, 80, 17 L. Ed. 547; *Rowell vs. Lindsay*, 113 U. S. 97, 5 Sup. Ct. 507, 28 L. Ed. 906; *Union Match Co. vs. Diamond Match Co.*, 162 Fed. 148-155, 156, 89 C. C. A. 172.

“In *Fay vs. Cordesman* above it is said, beginning at page 420 of 109' U. S., at page 244 of 3 Sup. Ct. (27 L. Ed. 979) :

“ ‘The claims of the patents sued on in this case are claims for combinations. In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such a reference to the descriptive part of the specifications as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material, leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality.’ ”

And again the court said in *Acme Truck & Tool Co. vs. Meredith*, C. C. A., 183 Fed. 124, 129:

“In *Eames vs. Godfrey*, 1 Wall. 78, 17 L. Ed. 547, in speaking of a patent for a combination, it is said:

“ ‘The end in view is proposed to be accomplished by the union of all, arranged and combined together in the manner described. The use of any two of these parts only, or of *two combined with a third, which is substantially different in form or in the manner of its arrangement and connection with the others*, is, therefore, not the thing patented. It is not the same combination if it substantially differs from it in any of its parts.’ ”

His Honor Judge Van Fleet, in the Court below, found infringement by, according to Levison, “a substantial application of the doctrine of equivalents,” and found his basis for such doctrine in the case of narrow combination patents in the paper bag case reported in 210 U. S. 405. We agree with his Honor that a combination patent is entitled to the application of the doctrine of mechanical equivalents, like any other patent, subject however, to the condition always imposed both in the Paper Bag Case and all other adjudicated cases of authority, that the degree of liberality to be accorded the claims in construing them is proportioned to the position of the patent in the art. That is, a pioneer patent is to be liberally construed, whilst a patent standing at the end of a long line of similar efforts, is limited to its specific construction. As I read the Paper Bag Case and the other cases of similar import, it seems impossible to accede to Judge Van Fleet’s broad statement that “the rule is as declared in the paper bag case, that a secondary or improvement patent *equally* with a *primary patent* is to have a fair and reasonable construction, and is entitled to the protection of the doctrine of equivalents to the extent that it shows a substantial improvement in the art; it is not of course entitled to the broad application to the doctrine equally with a pioneer or primary patent, but it is entitled to the application of that doctrine to the extent that its claims fairly and justly construed will so entitle it.”

In other words, Judge Van Fleet would extend the doctrine of mechanical equivalents to even the narrowest of patents.

About the latest expression of the Supreme Court that is instructive on this point and others here, is the Acetylene Burner Case reported in Advanced Sheets No. 3, January 1, 1910, U. S. Sup. Ct., page 46, 50, 215 U. S.—opinion by Mr. Justice Holmes. The Court said:

“The patent was held void below on the further ground that it had been anticipated. We turn to this last because the question is complicated with the theory that we have mentioned. If the Dolan patent had unreservedly committed itself to the notion of a cooling envelop with a contrivance made very short for the purpose of securing that result, the argument in defense of it would be that the leading earlier patents proceeded upon the opposite theory of mixture, and admitted, if they did not contemplate, a longer tube, however similar otherwise they might be. They, at least, exhibit the state of the art at the date of the supposed invention, and show *within what narrow and precise limits* Dolan had to move if he was to produce anything new. So much may be said to be undisputed, and we have mentioned some of the facts that cannot be denied. But, on the view that we have taken of Dolan’s specifications, they anticipate all that he can be said to have disclosed to the public.” (The italics are ours.)

So here if Levison is unreservedly committed to the notion of a *bound* carbon, as he admittedly is,

then the prior art shows within what *narrow* and *precise limits* Levison had to move if he was to produce anything new. No more complete refutation seems to be needed' to the novel doctrine advanced by his Honor in the lower Court that "secondary patents equally with pioneer patents" were entitled to a liberal application of the doctrine of equivalents.

At the same term of Court Mr. Justice Holmes delivered another opinion to the same effect: the case of *Brill vs. Washington R. & E. Co.*, reported 215 U. S.—Advanced Sheets No. 6, page 177, February 15, 1910. The Court said:

"It is difficult to put one's finger with certainty upon what the plaintiff claims. It certainly is not the total combination of a successful truck. Mr. Brill, the inventor and the plaintiff's assignor, is pictured as playing a large part in the development of street railway trucks, but whether that be true or not, his share in the invention of the truck that we have described, so far as the present patent, at least, is concerned, must be at best but very small. It is insisted to be sure, that the case is not affected by inventions for use with steam railroad cars, because of the different requirements upon street roads. Cars for the latter use must be low hung to make getting in and out easy, must accomodate the motors hung upon the axles, must be adapted to short curves, and so forth. But these differences are not of universal effect; indeed, this patent is not confined to street cars. The suspension of the car body upon a semi-elliptic spring hung from the side frame of the

truck by a jointed hanger, with most of the characteristics of the present patent, as disclosed in a patent to Thyng in 1845, was obviously as available for street as for steam railways, and the use of these features by Brill was not a patentable invention. The use, on the modern long car, of two four-wheeled pivotal trucks with a short wheel base and wheels of equal diameter, which support the car body by a pivot on a bolster between the axles, resting on semi-elliptic springs, was not peculiar to Brill. It was described in patent to Taylor, October 31, 1895, No. 507,855. Brill's specification disclaims at the outset the general features of the truck it describes. Indeed, it hardly is denied that every element in the combination was well known in the construction of railway cars.

“We are not dealing with a new type of trucks, but with certain features only. At the argument it was admitted that the plaintiff's case must stand or fall on claim 13 of No. 627,989. In that claim the only possible element of novelty is the mode in which the semielliptic springs are suspended from the side frames. In practice the links are elastic and the pins on which the whole combination hangs have a universal ball-and-socket movement, although the claim only says ‘movably and resiliently suspended substantially as described.’ Neither ‘movably’ nor ‘resiliently’ indicates the ball-and-socket arrangement, but it is described in the specification, and we give the plaintiff the benefit of the doubt. We agree, however, with the circuit court of appeals,

that the substitution of all ball-and-socket movement for the movement in one direction of the Thyng link, coupled, as it was, with a slight longitudinal play, required a minimum of invention. A link having universal movement was patented by Beach in 1876. The plaintiff's witness, Akarman, says that there always has been provision made for lateral and longitudinal motion in every well-constructed truck. Spring links to support semielliptic springs were old; it is unnecessary to recite the patents in which they appear. The mention of 'the usual link-hung bolster' in the disclaimer indicates the indisputable fact. We also agree with the other court that the disclaimer in favor of Brill and Curwen is a solemn admission of the priority of the devices claimed by them. It certainly covers the collocation of the spring links and semielliptic springs. One of the claims of Brill and Curwen is: '12. The combination in a car truck of the side frames, the equalizing-bars movably and resiliently suspended from the side frames, and a bolster supported on said equalizing-bars, substantially as described.' It is said that the Brill patent did not follow the Thyng invention for more than fifty years. The answer is that for most of that time it was not wanted. Very soon after the change in street railway travel required it, it came.

"If the plaintiff's claim could be sustained, which we cannot admit, it would be confined to the specific form of link described. There would be little room for the doctrine of equivalents. The defendant's device does not use a ball and socket, but uses a rigid

link supported by a relatively unyielding spiral spring in the frame of the truck, and does not infringe the very narrow claim which is the most that, in any view, could be allowed.”

We have quoted at considerable length from this opinion of Judge Holmes because it is one of the most recent expressions of the Supreme Court on the questions of Invention, Anticipation and the liberality of construction that is to be accorded a combination patent.

The opinion of Judge Holmes in the Brill case above, distinctly states:

“If the plaintiff’s claim could be sustained, which we cannot admit, it would be confined to the specific form of link, described. There would be little room for the doctrine of equivalents.”

We respectfully submit that Levison comes within the category to which the Brill patent belongs. Judge Van Fleet admits that in order to make out infringement Levison must be accorded “a substantial application of the doctrine of equivalents.” This we do not think he is entitled to.

As bearing on our contention that Levison is limited by the claims of his patent to a “bound” carbon “substantially as shown and described” in his specifications, see *Lieberman et al, vs. Ruwell et al.*, 170 Fed. 590 (C. C. A.). The Court said:

“But, without dwelling on a distinction which may be merely verbal, it is only necessary to remark that. where a patent depends for its novelty over *the prior art upon a single limited feature of construction*, the

claims cannot be expanded by any doctrine of equivalents to cover a device which lacks that single essential feature. *Typewriter Co. vs. Wyckoff et al.*, 151 Fed. 585, 81 C. C. A. 129.”

See also *Lewis Co. vs. Semple*, 177 Fed. 407, C. C. A., 9th Circuit, opinion of your Honors.

As further showing that Levison is in no sense a pioneer, is the fact that Levison *infringes the Barlow claim*. The Barlow claim is as follows:

“An improved blank for manifold copying, consisting,

- 1.—of a sheet of paper,
- 2.—divided into three equal sections,
- 3.—by lines of perforations,
- 4.—and printed in the same manner herein shown and described,
- 5.—whereby the sections may be folded upon each other with a single sheet of copying paper,
- 6.—in such manner that matter written upon one section will be reproduced upon the other two, substantially as set forth.”

Obviously, the above exactly describes the Levison device.

It is elementary that, “That which infringes if later would anticipate, if earlier.”

Muller vs. Eagle Mfg. Co., 151 U. S. 186;

Eames vs. Worcest Polytechnic Institute, 123 Fed 67.

This case therefore, is analogous in many respects to the case of the *Holt Mfg. Co. vs. The Best Mfg.* lately before you and reported in 172 Fed. 409. In

that case claim 11 of Berry, an anticipating reference, relied on by defendant below, was pointed out by your Honors to be infringed by Best, plaintiff below, and therefore such broad combination as might have been Best's was anticipated by Berry, and Best was therefore entitled only to a narrow patent for his specific construction.

THE VERY BEST EVIDENCE OF THE LACK OF EQUIVALENCY BETWEEN THE "BOUND CARBON" OF LEVISON AND THE CARBON HOLDING MEANS OF KITCHEN IS THAT THE PATENT OFFICE HAS GRANTED KITCHEN A PATENT ON HIS SPECIFIC CARBON HOLDING MEANS.

The respondent operates under a separate patent which is on the *carbon with its special piece of card board* to permit it to be stuck temporarily in between the leaves at any place in the book. Added to this actual difference between the carbon holding means of the parties, respondent therefor comes before this Court with the presumption that it does not infringe, which presumption it is entitled to as much as is the complainant that the presumption that the patent sued on is valid (especially when we consider the vast number of patents declared invalid by the courts each year).

The grant of the respondent's patent by the Patent Office raises the presumption not only that it is potentially different from complaintant's patented device, but that it does not infringe.

Kokomo Fence Co. vs. Kitselman, 189 U. S. 8,
47 L. Ed. 689;

Union Match Co. vs. Diamond Match Co., 162 Fed. 148, 155 (C. C. A.);

Corning vs. Burden, 15 How. 252, 14 L. Ed. 683;

Boyd vs. Janesville Hay Tool Co., 158 U. S. 261, 39 L. Ed. 973;

Taber vs. Marceau, 87 Fed. 871 (Judge Morrow).

The issuance of the defendant's patent creates a prima facie presumption of a patentable difference from the prior patent of the plaintiff.

Ransome vs. Hyatt, 69 Fed., 148.

“The defendants are manufacturing under and agreeably to two later patents, the mere issuing of which creates a presumption of a patentable difference between the plaintiff's bells and the defendant's bells.”

New Departure Co. vs. Hardware Co., 69 Fed., 152, 156.

“Considering the complainants and Whitney as alike having improved on the prior art, the question is whether the specific improvements of the one actionably invaded the domain of the other. The presumption from the grant of the letters is that there was a substantial difference between the inventions.”

Kokomo Fence Co. vs. Kitselman, 189 U. S., 8, 23; 47 L. Ed.

See, also :

Miller vs. Eagle Manufacturing Co., 151 U. S., 186, 208, 38 L. Ed., 131 ;

Wilgus vs. Germain, 72 Fed., 773, 776.

In *Illinois Steel Co. vs. Kilmer Co.*, 70 Fed., 1012, 1015, the defendant's machine was built under a patent later than that of the plaintiff. The Court said: "The grant of this later patent for a machine designed to accomplish the same result as that of the patents in suit raises the presumption that there is a substantial difference between them, and that the later is not an infringement of the earlier patents."

Citing :

American Nicholson Pavement Co. vs. City of Eliabeth, 4 Fish. Pat. Cases, 189, Fed. Cas. No. 312 ;

Ney vs. Manufacturing Co., 69 Fed., 405.

Upon this subject the United States Supreme Court said in *Corning vs. Burden*, 15 How., 252, 14 L. Ed., 683, 691 :

"It is evident that a patent, thus issued after an inquisition or examination, made by skillful and sworn public officers, appointed for the purpose of protecting the public against false claims or useless inventions, is entitled to much more respect, as evidence of novelty and utility, than those formerly issued without any such investigation. Consequently such a patent may be, and generally is, received as *prima facie*

evidence of the truth of the facts asserted in it. And in cases where the evidence is nicely balanced, it may have weight with a jury in making up their decision as to the plaintiff's right; and if so, it is not easy to perceive why the defendant who uses a patented machine should not have the benefit of a like presumption in his favor, arising from a like investigation of the originality of his invention, and the judgment of the public officers, that his machine is new, and not an infringement of the patent previously granted to the plaintiff. It shows, at least, that the defendant has acted in good faith, and is not a wanton infringer of the plaintiff's rights, and ought not, therefore to be subjected to the same stringent and harsh rule of damages which might be justly inflicted on a mere pirate. It is true the mere question of originality or infringement generally turns on the testimony of the witnesses produced on the trial; but if the plaintiff's patent in a doubtful case may have some weight in turning the scale in his favor, it is but just that the defendant should have the same benefit from his; *valeat quantum valeat*."

It is respectfully asked that the decree should be reversed with costs to appellant.

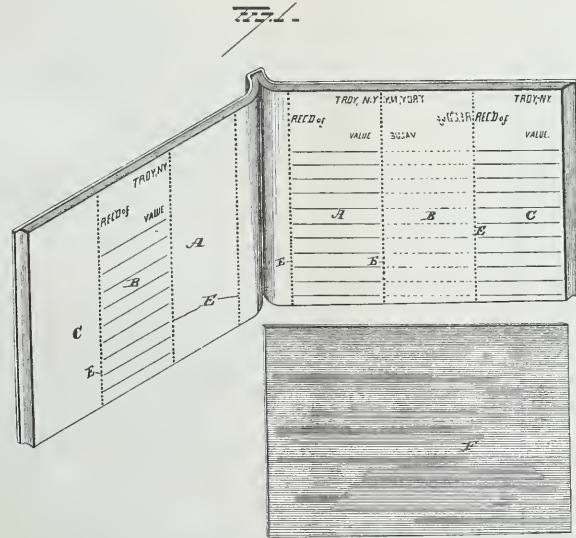
Respectfully submitted.

CHAS. E. TOWNSEND,
Solicitor for Appellant-Respondent.

H. G. & J. B. BARLOW.
DEVICE FOR MANIFOLD COPYING.

No. 297,556.

Patented Apr. 29, 1884.



The claim of this patent is as follows:

An improved blank for manifold copying, consisting of a sheet of paper divided into three equal sections by lines of perforations, and printed in the same manner herein shown and described, whereby the sections may be folded upon each other with a single sheet of copying-paper, in such manner that matter written upon one section will be reproduced upon the other two, substantially as set forth.

No. 612,197.

G. E. ODOUGHTY.
MANIFOLD BOOK.
(Application filed Sept. 17, 1897.)

Patented Oct. 11, 1898.

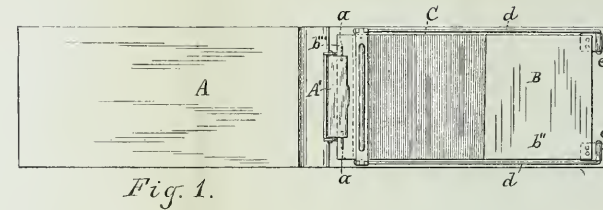


Fig. 1.

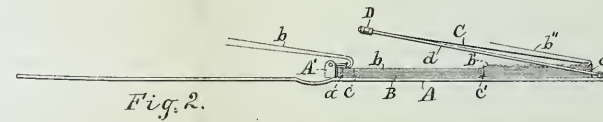


Fig. 2.

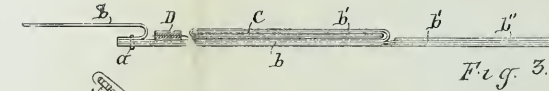


Fig. 3.

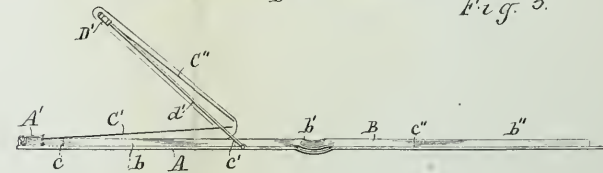


Fig. 4.

634,438.

A. ABRAHAM.
MANIFOLDING SALES BOOK.
(Application filed May 4, 1899.)

Patented Oct. 10, 1899.

Fig. 1.

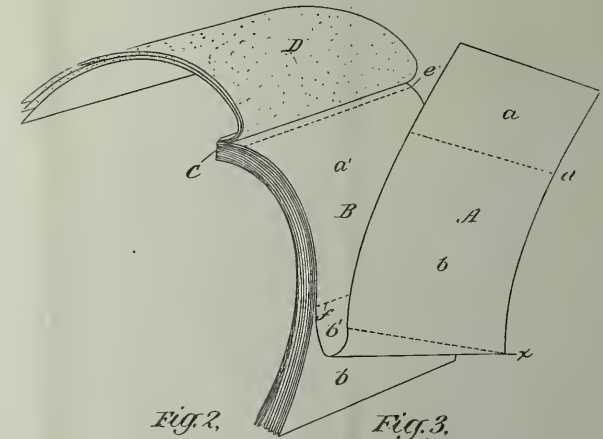
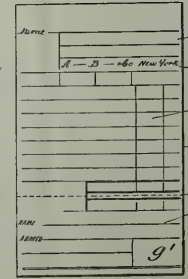
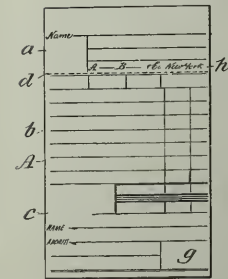


Fig. 2.

Fig. 3.



No. 553,503.

Patented Jan. 28, 1896.

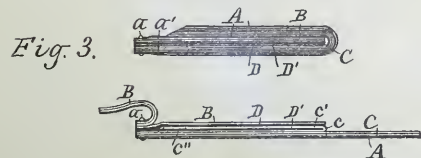
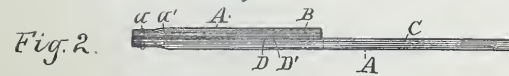
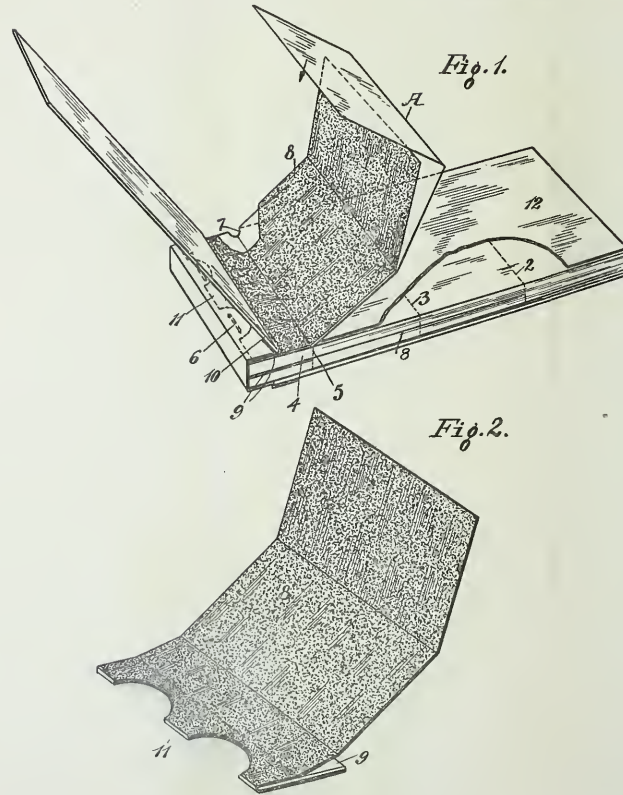


Fig. 4.

911,597.

Patented Feb. 9, 1909.



Eyles Petersen
Bellevue

INVENTOR
John Kitchen, Jr.
BY *Geo. H. Strong*
ATTORNEY

E. J. PERRY.
CARBON COPYING MANIFOLD SHEET OR BOOK.
No. 11,547. Reissued June 9, 1896

Exg. 1.

[illegible]

Fig. 2.

